Nos. 21,621, 21,632 and 21,649

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

No. 21,621

GALLENKAMP STORES CO., *et al.*,

Petitioners,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

No. 21,632

K-MART, a Division of S. S. KRESGE COMPANY,

Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

No. 21,649

HOLLYWOOD HAT CO.,

Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

On Petition to Set Aside an Order of the National Labor Relations Board.

Brief of Petitioner K-Mart, a Division of S. S. Kresge Co.

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JURISDICTIONAL STATEMENT.

This case is before this Court by way of three petitions, filed on behalf of six petitioners, praying that a Decision and Order of the National Labor Relations Board (reported at 162 NLRB No. 41)[1] be reviewed and set aside. As to each of the three petitions the Board has filed a cross petition for enforcement of its order. All six petitioners are engaged in business within this judicial circuit, in the state of California, and the unfair labor practices alleged in the complaint upon which the Decision and Order of the Board was entered allegedly occurred in California. Petitioners are aggrieved by such final order of the respondent cross petitioner (Board) and, therefore, this Court has jurisdiction under §10(f) of the National Labor Relations Act, as amended [61 Stat. 136 *et seq.* (1947), 29 USC §141 *et seq.* (1958)][2] The Board, in its cross petition and answers to the three petitions, has admitted petitioners' jurisdictional allegations.

I.
STATEMENT OF THE CASE.

A. History of the Case.

This case started on December 8, 1964 when the Retail Clerks Union Local No. 770 petitioned for an election in the San Fernando (21-RC-9308) and Commerce (21-RC-9309) K-Marts [Vol. I, pp. 9-10]. On the previous July 31, 1964, they had petitioned for

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[1]References to the documents reproduced in "Transcript of Record, Vol. I" are made by citation to "Vol. I" and to the page number where the documents appear. References to the stenographic transcript of the unfair labor practice hearing reproduced in "Transcript of Record, Vol. II" and to the stenographic transcript of the representation hearing, reproduced in "Transcript of Record, Vol. II-A" are made by citation to the appropriate volume and transcript page number. References to all undesignated exhibits are made by citation to Vol. III and to the appropriate exhibit number.

[2]The pertinent statutory provisions are reprinted, *infra,* at Appendix B.

elections at the Westminster (21-RC-9128) and Santa Ana (21-RC-9130) K-Marts [Vol. I, pp. 7-8]. On December 15, 1964 the Regional Director in Los Angeles ordered that the four petitions for elections at the K-Marts in Westminster, Santa Ana, San Fernando and Commerce be consolidated for hearing [Vol. III, G.C. Ex. 2(b)]. A consolidated hearing was held on January 18 and 19, 1965 before Hearing Officer Steinfeld in Los Angeles [Vol. II-A].

The principal issue in contention at that time, and since, is whether Licensee employees should be included with K-Mart employees in one bargaining unit. The union contended that Licensee employees should be included with the K-Mart employees in one bargaining unit. K-Mart (with the Licensees in agreement) maintained its position that the unit should consist only of K-Mart employees.

On February 24, 1965, the Regional Director, Ralph E. Kennedy, issued his Decision and Direction of Election in the Westminster, Santa Ana and Commerce stores, ruling that K-Mart and its Licensees were joint employers [Vol. III, G.C. Ex. 5(a)]. On March 5, 1965, K-Mart filed with the Board a Request for Review of the Regional Director's decision, objecting particularly to his finding that K-Mart and its Licensees were joint employers [Vol. III, G.C. Ex. 6]. The Board denied K-Mart's Request for Review on March 30, 1965 [Vol. III, G.C. Ex. 9]. This order of the Board was, of course, unappealable by K-Mart at that time.

The election was conducted at the Commerce K-Mart on April 7, 1965. The union received 37 votes; there were 33 votes against the union, and 9 ballots were challenged, this being enough to affect the outcome [Vol. III, G.C. Ex. 14].

On April 13, 1965, K-Mart filed six specific objections to the union's conduct prior to the election, which

conduct included numerous misrepresentations, threats, coercion and wrongful inducements of votes [Vol. III, G.C. Ex. 16]; on April 14, 1965, the union filed objections to K-Mart's conduct [Vol. III, G.C. Ex. 15]. As a result, and following an investigation which was completely *ex parte,* on June 30, 1965, the Regional Director issued his Supplemental Decision and Direction ordering a new election. He overruled all of the union's objections. He overruled all of K-Mart's objections except objection No. 3, which was upheld, and which related to the union's distribution of misleading handbills on the day before the election [Vol. III, G.C. Ex. 28(a)]. On July 12, 1965, K-Mart filed exceptions to and a Request for Review, in part, of the Regional Director's Supplemental Decision arguing that its objections Nos. 1, 2, 4, 5, and 6 should have been sustained, as well as its objection No. 3 [Vol. III, G.C. Ex. 32]. The union also filed with the Board exceptions and a Request for Review of the Regional Director's Supplemental Decision and Direction objecting, among other things, to his ruling on K-Mart's objection No. 3 [Vol. III, G.C. Ex. 29].

On July 20, by a telegram Order, the Board denied K-Mart's Request for Review "as raising no substantial issues warranting review." However, the Board granted the union's Request for Review insofar as it concerned the Regional Director's sustaining of K-Mart's objection No. 3; with respect to that objection, the Board ordered the Regional Director to open and count the challenged ballots and if the union lost, to consider the issue represented by K-Mart's objection No. 3 as moot; but if the union won, the Board would review the Regional Director's disposition of K-Mart's objection No. 3 [Vol. III, G.C. Ex. 35].

Pursuant to the Board's telegram Order and on July 23, 1965, the Regional Director opened five of the nine challenged ballots (the other four voters having

been found ineligible) and found four against the union and one for the union. Thus, the tally of ballots showed a vote of 38 to 37 in favor of the union [Vol. III, G.C. Ex. 36]. Thereafter, K-Mart filed a brief in support of the Regional Director's determination on objection No. 3 [Vol. III, G.C. Ex. 37], but on September 9, 1965, the Board overruled its Regional Director on this point, upheld the union, denied K-Mart's request for oral argument and certified the union as bargaining agent [Vol. III, G.C. Ex. 40].

On September 21, 1965, the union demanded that K-Mart meet for the purposes of collective bargaining [Vol. III, G.C. Ex. 41 "A"]. No demand was made at this time on the Licensees. By letter dated September 29, 1965, K-Mart refused to bargain with the union on the grounds that the unit was inappropriate and that the employees had not had a "free, untrammeled and uncoerced" election [Vol. III, G.C. Ex. 41 "B"]. On October 5, 1965, the union filed unfair labor practice charges against K-Mart, alleging that it was guilty of a refusal to bargain (Section 8(a)(5)) (21-CA--6937) [Vol. III, G.C. Ex. 1(a)].

On October 18, 1965, the union made demand by letter on all the Licensees except Zale Jewelry (which had commenced operations in the Commerce K-Mart after this proceeding had started) and the Licensees separately refused to bargain [Vol. III, G.C. Ex. 42 "A" and "B", 43 "A" and "B", 44 "A" and "B", 45 "A" and "B", 46 "A" and "B", 47 "A" and "B"].

On December 10, 1965, the acting Regional Director of the 21st Region issued a complaint against K-Mart and its Licensees alleging an unlawful refusal to bargain [Vol. III, G.C. Ex. 1(c)]. K-Mart, in its Answer to Complaint, denied that its action was unlawful [Vol. III, G.C. Ex. 1(g)].

On March 22, 1966, a hearing was conducted on the unfair labor practice charges before Trial Examiner

William E. Spencer [Vol. II]. On June 17, 1966, this Trial Examiner issued his Decision containing a recommended Order that K-Mart and the Licensees, Gallenkamp Stores, Co., Mercury Distributing Company, Acme Quality Paints, F & G Merchandising, Hollywood Hat Company and Besco Enterprises, Inc., bargain with the union [Vol. I, pp. 305-313]. Exceptions were subsequently filed by K-Mart to this Decision of the Trial Examiner, [Vol. I, pp. 314-317]. In this Decision and Order the Board merely amended the recommended Order by deleting the individual names of the Licensees and substituting a generic description [Vol. I, p. 326].

This Petition for Review from the Decision and Order of the Board, dated December 30, 1966, in this Case No. 21-CA-6937 then followed [Vol. I, p. 329].

B. The Facts of the Appropriate Bargaining Unit.

(1) The License Agreement.

S. S. Kresge made a decision several years ago. It was just entering the discount department store business by the institution of its K-Mart stores. It planned to operate many of the departments in these stores by licensing them out to independent merchants. The decision which had to be made was whether S. S. Kresge Company should control the labor relations of these independent merchants, or to leave this matter in the merchants' own hands.

The decision which S. S. Kresge Company made was to let the independent merchants run their own labor affairs. It accordingly drafted its standard License Agreement to achieve that purpose. Under National Labor Relations Board and court decisions of those days, it accomplished that purpose.

The Board has now told S. S. Kresge Company that its License Agreement didn't do any such thing. For it has determined that the appropriate bargaining unit in

the Commerce, California K-Mart (the store involved in this appeal) must consist of employees of K-Mart *and* employees of the licensees in that store; this being on the theory that K-Mart had the legal right to, and did in fact, dominate the labor relations of its licensees, thereby making them "joint employers." And this has raised one of the issues which is fundamental in this case, namely, whether S. S. Kresge Company, or any other merchant, has the right to enter into a contract with operators of licensed departments in discount department stores under which the licensees retain their independence in labor matters.

At the time of the representation hearing (21-RC-9309), the Commerce, California K-Mart included the following licensees: (a) Gallenkamp Stores Co., selling shoes; (b) Mercury Distributing Company, selling ready-to-wear, men's wear, infants' wear and lingerie; (c) Acme Quality Paints, selling home improvements, such as paints; (d) F & G Merchandising, selling automobile accessories and servicing automobiles; (e) Hollywood Hat Company, selling hats and purses; and (f) Besco Enterprises, Inc., selling jewelry and cameras [Vol. II-A, pp. 38-39].

The Licensees at the Commerce, California K-Mart all operated under the standard K-Mart License Agreement [Vol. III, G.C. Ex. 2(c), Employer's Ex. 1].

The License Agreement contained certain rules which pertained to the retail operation of each Licensee. Thus, it provided a formula for the payment of rent, it covered the furnishings of fixtures, the operation of cash registers, the use of the K-Mart name, minimum standards for the maintenance of Licensee's area in the store, advertising and merchandising arrangements, provisions covering damages to property or persons, and other similar provisions which could be expected in an agreement of this sort. Its provisions were primarily aimed at the details of the retailing relationship.

The License Agreement said very little about personnel matters, and nothing about labor relations matters. Paragraph 4 of the License Agreement required the Licensee to comply with all statutes respecting health and welfare benefits of "its employees". Paragraph 10 authorized K-Mart "for the benefit of the common enterprise" to adopt Rules and Regulations "consistent with this License Agreement", which, as the License Agreement put it, "shall govern but not be limited to the following subjects: order and appearance of the store, methods for handling of cash and cash registers, credit, will-call and lay-away sales, payments made by Licensor for account of Licensee, refunds, pricing policies, inventory requirements, disposal of old merchandise, overlap in merchandise carried by various Licensees, products liability insurance, employment practices, personnel and store policies, receiving of merchandise and store security."

To summarize, then, the License Agreement concerned itself with the merchandising aspects of the business relationship between Licensor and Licensee. Consonant with the parties' intent, the License Agreement did not purport to cover any matters which are traditionally thought of as essential to labor relations policy.

License agreements in retail operations akin to K-Marts frequently contain clauses specifically providing that the Licensor has control over the labor relations of the Licensees.[3] No such clause is found in the K-Mart License Agreement.

License Agreements also frequently provide that the Licensee may enter into collective bargaining agree-

[3]For example, this provision appears in License Agreements found in the following cases: *Franklin Simon & Co.,* 94 NLRB 576 (1951); *Frostco Super Save Stores, Inc.,* 138 NLRB 125 (1962); *Spartan Dept. Stores,* 140 NLRB 608 (1963); *Grand Central Liquors,* 155 NLRB No. 33 (1965).

ments only with the consent of the Licensor, or that the Licensee agrees to be bound by any collective bargaining agreement negotiated by the Licensor.[4] No such provision appears in the K-Mart License Agreement.

The License Agreement does not reserve to K-Mart any of the following: the right to hire or control the hiring of Licensee employees; the right to discharge or control the discharge of any Licensee employees; the right to discipline or control the discipline of any Licensee employees; the right to determine or control the determination of rates of pay, or fringe benefits of Licensee employees; the right to give direct orders to Licensee employees; the right to control a Licensee's attitude or relations towards unions, strikes, union contracts, bargaining, election campaigns leading to Board elections, or other matters relating to labor relations policies, or any control, direct or indirect, over any other subject matter which is normally considered to be a part of the labor relations of Licensee.

The License Agreement not only does not specifically create a joint employer relationship, it actually prohibits such a relationship in Section 22 which reads: "The parties do not intend this Agreement to constitute a joint venture, partnership, or lease and nothing herein shall be construed to create such a relationship."

Pursuant to the right reserved to it at Paragraph 10 of the License Agreement K-Mart has issued a standard printed set of Rules and Regulations [Vol. III, G.C. Ex. 2(c) Ex. 2]. Even a cursory review of

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[4]This type of condition may be found in the License Agreements involved in the following cases: *Gaylord Discount Stores,* 137 NLRB 125 (1962); *Frostco Super Save Stores, Inc.,* 138 NLRB 125 (1962); *United Stores of America,* 138 NLRB 383 (1962); *Spartan Dept. Stores,* 140 NLRB 608 (1963); *Bab-Rand Co.,* 147 NLRB 247 (1964); *Esgro Anaheim, Inc.,* 150 NLRB 401 (1964); *New Fashion Cleaners, Inc.,* 152 NLRB 284 (1965); *Bargain Town USA of Puerto Rico,* 162 NLRB No. 94 (1967).

these rules and regulations demonstrates that they do not attempt to exercise control of labor relations matters of Licensees. On the contrary, they merely contain some general provisions of common interest to all of the employees in the K-Mart including rules which set down minimum standards of decorum. A prime illustration of the Rules and Regulations' non-involvement in labor relations matters is found at page 1, under the heading "Employment", where each licensee is expressly given the right to hire and fire its own employees, in this language: "All hiring and terminations, so far as they apply to each Licensee, will be under the supervision of the Licensee's manager."

The Rules and Regulations also make it clear that K-Mart has no control over the settlement of a Licensee's labor dispute. Indeed, the only reference to this subject is found at page 2, subparagraph C, under the heading "General Operation of Store" at which point the Licensee is directed not to permit the continuance of a labor dispute which "materially affects" the sales or threatens the operation of the Licensor or other Licensees. It is quite significant, however, the no power is given to K-Mart to dictate the terms of any such settlement.

(2) How the Parties Applied the License Agreement.

Neither the License Agreement nor the Rules and Regulations have any language giving S. S. Kresge control of the labor relations of the Licensees. The parties obviously believed that Kresge did not have such control under the License Agreement. Their conduct proves this.

This conduct—unchallenged and remarkable in its consistency—tells this story:

(a) The wage of each of the employees of each of the Licensees is determined by the Licensee independent of K-Mart and K-Mart has no power,

potential or otherwise, to affect the Licensees' wage formulae and K-Mart has never attempted to do so [Vol. III, G.C. Ex. 2(a), Vol. II-A, p. 47; pp. 55-56].

(b) The employees of the Licensees receive different and separate benefits from their employers than K-Mart employees, including Christmas bonuses, holiday allowances, Blue Cross protection, group life insurance, stock purchase plan participation, and vacations [Vol. III, G.C. Ex. 2-(a), Vol. II-A, pp. 51-54].

(c) The employees of K-Mart have in the past been permitted discounts on purchases made of K-Mart products, but the employees of Licensees were not afforded the same benefit [Vol. III, G.C. Ex. 2(a), Vol. II-A, pp. 48-49].

(d) The Licensees separately determine the hours of work for each of their employees and these hours are often different from hours of work of the employees of K-Mart [Vol. III, G.C. Ex. 2(a), Vol. II-A, p. 47; pp. 54-55].

(e) None of the employees of K-Mart at any time works for or does the work of any Licensee [Vol. III, G.C. Ex. 2(a), Vol. II-A, pp. 49-50; p. 101].

(f) None of the employees of the Licensees works for or does the work of K-Mart [Ibid].

(g) A number of the employees of some or all of the Licensees are employed on frequent occasions by the various Licensees at locations other than K-Marts and at locations totally independent of the K-Mart or Kresge enterprises [Vol. III, G.C. Ex. 2(a), Vol. II-A, pp. 50-51].

(h) The number of employees each Licensee has and the particular task that these employees do are

determined solely, separately and independently by the Licensees, and K-Mart has made no attempt to interfere with the Licensees in this regard [Vol. III, G.C. Ex. 2(a), Vol. II-A, p. 47].

(i) The previous experience required of employees of various Licensees often differs greatly with that of the employees of K-Mart [Vol. III, G.C. Ex. 2(a), Vol. II-A, p. 56].

(j) None of the employees of any of the Licensees reports to any of the supervisors of K-Mart, and the supervisors of K-Mart do not supervise any of these employees in any manner, shape or form [Vol. III, G.C. Ex. 2(a), Vol. II-A, p. 39; pp. 45-46; p. 228].

(k) Neither K-Mart nor any of its supervisors has any authority to discharge any employee of any Licensee, nor can any Licensee interfere in any manner with the day-to-day work assignments of any employee of K-Mart [Vol. III, G.C. Ex. 2(a), Vol. II-A pp. 45-46; pp. 225-226; p. 228].

(l) Each of the Licensees has, in addition to its own supervisor, one or more supervisors, at times referred to as roving supervisors, who spend all or a considerable amount of their time managing and supervising its operations in the K-Mart stores, and in particular the K-Mart store here in question [Vol. III, G.C. Ex. 2(a), Vol. II-A pp. 56-58; p. 65; pp. 208-209; p. 300].

(m) Neither these roving supervisors nor any other supervisor of the Licensees stationed in each of the stores reports to or receives directives from K-Mart [Vol. III, G.C. Ex. 2(a), Vol. II-A pp. 56-58].

(n) Each of the Licensees determines for itself what its merchandise price policy will be for the prod-

ucts it sells. Such determinations are almost always made without consultation or approval of K-Mart [Vol. III, G.C. Ex. 2(a), Vol. II-A p. 47; p. 224; pp. 227-228].

(o) Each Licensee determines for itself which line of merchandise it will sell in its concession department and, in practice, the Licensor makes no effort to interfere with the independent judgment of its Licensees [Vol. III, G.C. Ex. 2(a), Vol. II-A p. 48].

(p) The employees of the Licensees, on the one hand, and the employees of K-Mart, on the other hand, are treated separately by their employers in regard to Unemployment Compensation, Workmen's Compensation, and Federal and State tax assessments [Vol. III, G.C. Ex. 2(a), Vol. II-A pp. 46-47].

(q) The personnel and payroll records, including the timecards of the Licensees' employees are kept separate and independent from those kept by K-Mart of its employees, and K-Mart has no control, access, or information in its files concerning the employees of or number of employees of the Licensees [Vol. III, G.C. Ex. 2(a), Vol. II-A p. 47].

(r) Each of the Licensees separately has its separate payroll and separate method of paying its employees by its own checks [Vol. III, G.C. Ex. 2(a), Vol. II-A pp. 29-40; p. 47; p. 49].

(s) All accounting and bank deposits of K-Mart are separately handled independently from those accounts and bank deposits which each of the Licensees handles by itself [*Ibid.*].

(t) K-Mart has no knowledge or access to the profit or loss data of each or any of its Licensees [Vol. III, G.C. Ex. 2(a), Vol. II-A p. 55].

(u) While there is a central desk where customers may bring complaints regarding a purchase of merchandise or services, in many instances complaints are brought directly to the Licensees; in most instances, complaints are initially brought to the Licensees, and in virtually all instances, the Licensee has and exercises the final right to determine the validity of any particular complaint [Vol. III, G.C. Ex. 2(a); Vol. II-A p. 56; pp. 93-98].

(v) Each of the Licensees separately handles its own incoming freight [Vol. III, G.C. Ex. 2(a); Vol. II-A p. 49].

(w) Each of the Licensees has its separately listed and installed phone number and may be reached by customers independently from the central exchange of K-Mart [Vol. III, G.C. Ex. 2(a); Vol. II-A p. 296].

(x) While there is a practice in many instances for K-Mart to advertise its products jointly with the products of the Licensees, at least two of the Licensees separately purchase and advertise independently from K-Mart [Vol. III, G.C. Ex. 2(a); Vol. II-A pp. 84-85; pp. 194-195]. In all cases, the Licensees themselves determine the format of that portion of any joint advertising that is conducted by K-Mart and the Licensees [Vol. III, G.C. Ex. 2(a); Vol. II-A pp. 44-45; pp. 84-86; pp. 194-195; pp. 295-296].

(y) In practice, numerous personnel directives and regulations promulgated and enforced by K-Mart have no application to and are not the concern of the employees of any of the Licensees [Vol. III, G.C. Ex. 2(a); Vol. II-A pp. 214-223; Vol. III, G.C. Ex. 2(c), Employer's Ex. 3(a)-(f)].

All of the foregoing testimony is absolutely uncontradicted. It has never been disputed or even discussed by the Board at any stage of this proceeding.

C. The Facts of the Union's Misconduct Prior to the Election.

The Union allegedly "won" this election on April 7, 1965 by a single vote—38 to 37. However, the undisputed facts show that this "victory" was the product of union acts of misconduct, including threats, misrepresentations and coercion. Significantly, the Board has assumed that the following acts of misconduct occurred precisely as K-Mart's witnesses alleged:

1. On the evening prior to the election, that is on April 6, 1965, the union distributed to the employees handbills which gave false information on two counts of critical importance. The handbills compared alleged K-Mart rates with "union" rates and purported to show that the latter were higher than the K-Mart rates listed. In the first place, some K-Mart employees received a wage scale higher than that listed for K-Mart in the leaflet. Secondly, "union" rates were in fact not the wages received by employees in unionized stores, but were actually the highest of four categories of wage levels for the classifications involved and did not apply to any employees until they had acquired one year of service. There were a substantial number of K-Mart employees who had less than one year of service at that time [Vol. III, G.C. Ex. 16, Objection No. 3].

2. Certain K-Mart employees were threatened with loss of jobs if the union did not win the election [Vol. III, G.C. Ex. 16, Objection No. 1]. One, Elaine Williams, was told "If you don't join the union and the union is voted in, you will lose your job." [Vol. III, G.C. Ex. 21, Exhibit "A"]. Another, Linda Crabtree, was told ". . . if the union gets in and you

don't vote for us you'll be looking for another job." [Vol. III, G.C. Ex. 21, Exhibit "B"].

3. A K-Mart stock boy, Leo Hosey, was terrified by union representatives and was told that "You we don't want. You'd better hope that the union doesn't get in"; and on another occasion "We know you, Leo, and when we get in, we'll get you." In addition, this employee was placed under open surveillance by the union and followed to and from his place of work [Vol. III, G.C. Ex. 6, Objection No. 2]. Hosey subsequently denied he had been threatened but it was obvious that it was his fear that caused this later denial. He himself admitted ". . . I was scared of the union". The true facts were accurately set forth in affidavits furnished by other employees, including an eye-witness to the threats, Gordon Bloomfield [Vol. III, G.C. Ex. 21, Exhibit "C"], V. L. Cooper [Vol. III, G.C. Ex. 21, 32, Exhibit "D"], Michael Castanon [Vol. III, G.C. Ex. 21, 32, Exhibit "E"] and Irene Reyes [Vol. III, G.C. 21, 32, Exhibit "F"].

4. On election day, shortly before the polls opened, a union representative made false and misleading statements on material matters to a 19-year-old female employee of the K-Mart store, Carol Platteborze [Vol. III, G.C. Ex. 16, Objection No. 6]. Miss Platteborze was told [Vol. III, G.C. Ex. 21, Exhibit "L"; G.C. Ex. 32, Exhibit "J"]:

(a) That there would not be double dues assessments at K-Mart and that "double dues is done approximately every four years or so." In fact, each of the above statements were untrue [Vol. III, G.C. Ex. 32, Exhibit "I"].

(b) That a victory for the union automatically guaranteed certain specific wage and other contract benefits for K-Mart employees when in fact any such "benefits" would only be those agreed upon by the parties in collective bargaining negotiations.

(c) That the Union had not had a strike in 25 years, which statement was entirely false; that if an impasse in negotiations should occur "all the employees' jobs would be given back to them because it was in the contract that the job must go to those with the most seniority", which is completely contrary to Supreme Court decisions permitting the permanent replacement of economic strikers; and that in the event of an economic strike, "the employees are paid . . . unemployment for 35 weeks plus 13 weeks, if necessary, so they could be on strike for a year and get paid for it," a statement diametrically opposed to the provisions of Section 1262 of the California Unemployment Insurance Code which declares that unemployment compensation is not paid to economic strikers.

(d) That under an open shop agreement nonunion employees would be paid at a lower rate than union members, a representation which, to those knowledgeable, is an unfair labor practice in violation of Section 8(a)(3) of the Act.

(e) That if employees changed their mind after certification of the union, "30 days after the union enters a decertification petition can be filed downtown". This statement is completely contrary to the Act; Sections 9(c)(3) and 9(e) forbid a decertification election for one year after a previous valid certification election, and even then only permit the same upon petition of 30 percent of the employees in the unit.

5. The union was misleading employees during the compaign by the distribution of a letter and card [Vol III, G.C. Ex. 16, Objection No. 5; G.C. Ex. 21, Exhibits "G" and "H"] to all employees which showed that the union would waive the usual initiation fee, but only in the event the union won the election, which is an improper and illegal promise to make pending an election.

6. Approximately one week prior to the election, the union sent letters to K-Mart employees which falsely advised them that they would "not be required to pay double dues as some of the members have voluntarily voted to do." [Vol. III. G.C. Ex. 16, Objection No. 4; G.C. Ex. 32, Exhibit "G"; see also Exhibit "H"] yet an article contained in the union's own news publication stated that the double dues requirement applied to "all members" and the only exception suggested were those in employee classifications not relevant to K-Mart employees.

II.
SPECIFICATION OF ERRORS RELIED UPON.

The National Labor Relations Board erred in the following respects:

1. In concluding and holding that Petitioner, K-Mart, together with the Licensees at its discount store in the City of Commerce, State of California, are joint employers and, as such, must bargain collectively as to wages, hours and other terms and conditions of employment with Retails Clerks Union Local No. 770.

2. In concluding and holding that the standard License Agreement and the Rules and Regulations promulgated thereunder by K-Mart reserved to K-Mart actual control, or the right to control, the labor relations policies of its Licensees.

3. In concluding and holding that K-Mart in fact exercised substantial control over the labor relations policies of its Licensees.

4. In failing to conclude and hold that K-Mart has not controlled, and is not capable of controlling, the labor relations policies of its Licensees and, therefore, is not a joint employer of its Licensees' employees.

5. In concluding and holding that the Retail Clerks Union is the *bona fide* representative of a free and un-

coerced majority of employees in a unit appropriate for purposes of collective bargaining.

6. In failing to conclude and hold that the Retail Clerk's Union Local No. 770 engaged in coercive, threatening, misleading, false and other improper and unlawful conduct which unlawfully interfered with the free and untrammeled choice of employees in the unit found appropriate by the Board, and that said conduct invalidated the election of the union as collective bargaining agent for K-Mart employees.

III.
SUMMARY OF ARGUMENT.

A.

The Board's Order that K-Mart and its Licensees bargain as joint employers with the union is not supported by substantial evidence in the record and represents unsound labor policy frustrating the purposes of the Act. The underlying joint employer finding is based on an improper legal interpretation of the License Agreement and Rules and Regulations under which the parties operated. Neither the language of the License Agreement nor the conduct of the parties thereunder, was such that the Board could reasonably infer that K-Mart actually controlled, or had the right to control, labor relations policies of its Licensees. Indeed, all of the record evidence is to the contrary. The determination that K-Mart must bargain as a joint employer is the result of improper conclusions based other than on the record in this proceeding and represents the abandonment of a long standing and sound basis for determining retail joint employer cases in favor of an arbitrary, unsound and unlawful rule.

B.

The Union was improperly certified by the Board as the bargaining agent for K-Mart employees when the record conclusively demonstrates that its election "vic-

tory"—gained by the margin of a single vote—was the product of a concerted pre-election union campaign of threats, misrepresentations and coercion. This illegal union conduct consisted of (a) the distribution of leaflets materially misrepresenting facts regarding competitive wage rates; (b) threatening K-Mart employees with loss of jobs if they did not join or support the union; (c) threatening K-Mart employees with physical and other reprisals; (d) misrepresenting facts to a K-Mart employee on election day; (e) illegal offers to waive initiation fees contingent on the results of the election; and (f) circulating letters which misled employees with respect to payment of double union dues.

Incredibly, each of the above incidents were dismissed by the Board as insufficient in law to warrant setting aside the election, even though the Board found it necessary to assume that the K-Mart witnesses who testified to this union activity by affidavit, truthfully and accurately described the union's conduct. Each act, standing alone, provides more than an ample basis for invalidation of the union's certification. Viewed in combination, these acts legally necessitate that result.

IV.
ARGUMENT.

A. The National Labor Relations Board's Order That K-Mart Should Be Forced Against Its Will to Bargain as a Joint Employer With Its Licensees Represents an Unsound and Improper Labor Policy Which Frustrates the Purposes of the National Labor Relations Act.

This was a shotgun marriage. And like most shotgun marriages, it won't work well. And it won't work well because independent employers are being forced against their will to bargain as one with the union. The problems this creates will not contribute to sound bargaining relationships and constructive collective bargain-

ing and therefore will tend to frustrate the fundamental purpose of the National Labor Relations Act.

K-Mart thought it had drafted a License Agreement which reserved to its Licensees their individual independence in labor relations matters. When it signed the License Agreements it did not believe it was taking over or controlling, or obtaining the right to take over or control, the labor relations policies of its Licensees. In its operation of this K-Mart in Commerce, California, K-Mart impeccably observed the independence of its Licensees in labor matters. Now it is told by the Board that it was wrong; that it didn't know its own intentions when it drafted its standard License Agreement; that it was acting in error when it operated the K-Mart under the belief that each Licensee was master of its own labor relations policies; and that even though it didn't want to, it must act as one employer with its Licensees.

And the Licensees felt as K-Mart did. When they signed the License Agreement they believed they were retaining control of their own labor relations in operating their license department at the Commerce K-Mart. They certainly acted as though they retained this independence. They hired and fired their own people. They set their own wage rates. They applied their own fringe benefit programs. They supervised and disciplined their own employees. At no time did they even ask K-Mart for help in these fundamental labor relations areas. And yet they are now told by the Board that they signed away this independence to K-Mart when they signed the License Agreement and against their will, they must bargain as a "joint employer" with K-Mart.

The difficulties presented to the parties if they must bargain as joint employers are many. Merely calling them "joint employers" does not solve these problems. First, these unwilling employers must determine

whether the statutory obligation to bargain is primarily that of the K-Mart on the theory that it has the power to control the labor relations policies of its Licensees. On this theory presumably (the Board did not enlighten the parties) K-Mart would be in active charge of negotiations with the union. K-Mart would make the determination of what wages would be paid the Licensees' employees, as well as K-Mart employees, and what fringe benefit programs would be applicable. In other words, K-Mart would be the employer. And while it would be free to consult with its Licensees, the basic statutory obligation of recognizing the union and bargaining with them would be K-Mart's. Or it is possible that when the Board called these employers "joint employers" it meant that they each had an independent and separate statutory obligation to bargain with this union, but the bargaining must take place at one bargaining table. This would indeed be a cumbersome and awkward result.

The problem is further complicated because some of the Licensees at the Commerce K-Mart are units of large national chains and some are small "ma and pa" operations. K-Mart, the Licensor, is a division of S. S. Kresge Company, a national retail chain; Gallenkamp and Mercury Distributing Company are divisions of Shoe Corporation of America; F & G Merchandising is a subsidiary of U. S. Rubber Company; Acme Quality Paints is a subsidiary of Sherwin Williams Company; Zale Jewelry (not an original party to this cause but now operating in this K-Mart) is a New York based corporation owning more than 400 stores in 41 states. Such large organizations have their own individualized national policies involving labor relations matters, such as wage scales, pension plans, insurance progams, and the like. These basic policies undoubtedly differ from those of the other large chains with which they are being forced to bargain. And two of the orig-

inal Licensees, Hollywood Hat Company and Besco Enterprises are small companies. Such small retail companies often are forced to adopt labor relations policies at sharp variance with the much larger national chains.

No doubt the Board will answer that these problems can be overcome through joint efforts of the employers—a sort of inter-employer collective bargaining. And no doubt it can be pointed out that employers do bargain jointly, and have for many years, without seriously undermining the collective bargaining process or the bargaining relationships of these employers. The answer to this is, of course, that *voluntary* joint bargaining by employers does work and has worked in many bargaining situations. For such employers enter the joint bargaining relationship voluntarily and with their eyes open. They know that they must work out the problems of a common bargaining posture with their fellow employers in order to make a joint bargaining relationship successful. Frequently the joint employers are competitors in the same business who are interested in maintaining the same labor costs so that no employer gains an undue competitive advantage. Moreover, there is a safety valve available to voluntary joint employers, namely, they may withdraw from the joint bargaining relationship if they find it unworkable and detrimental to sound bargaining relations with their own union.

But we are talking in this case about a joint employer relationship which is forced upon unwilling employers. Here no one has entered the relationship willingly and because of that the resolution of differences in bargaining programs and in wage and benefit scales might be all but impossible.

The small Licensee, for example, may truly be unable to afford the economic program that the large chains

would be willing to agree to. In this event, with possible business failure facing him, it is probable that such a Licensee would be forced to argue strongly for his point of view and dispute any program that he felt would put him out of business. We do not think it is in accordance with the purposes of the Act if such a small employer is finally forced to go along by his bigger brothers and this then puts him out of business and his employees lose their jobs and seniority. The Licensees, as units of large chains will also have the problem of reconciling their various national programs in connection with wage and fringe benefits. Should a fundamental difference of opinion occur between two large chains, and if the firms feel strongly enough about it, one more hurdle must be cleared before the so-called "joint employers" face the bargaining table. For no safety valve is available to these employers, as it is to those who voluntarily agree to joint bargaining, namely, the right to withdraw from the joint bargaining relationship.

And there are employee rights which must be protected. For in its zeal to force the employers in K-Mart to bargain jointly, the Board has deprived the employees of each employer of their right to determine if they want a union, and, if so, which one. The courts have agreed that employee rights are of vital importance and have held that even where employers *voluntarily* agree to joint bargaining, the approval of such action must be given only with great caution for fear of violating the rights of the employees of various employers. See *NLRB v. Local 210 Teamsters Union* 330 F. 2d 46 (2d Cir., 1964), 12 ALR 3d 800, and cases cited in ALR note which follows.

The attitude of the Board in *Local 210 Teamsters', supra,* is summarized by the General Counsel's brief to the Board in that case, as follows:

> "A multiemployer unit is not naturally and inherently appropriate, as is a unit limited to employees of a single employer or a single plant, units specifically mentioned in Sec. 9(b) of the statute. *Rainbo Bread Co. 92 NLRB 181; Arden Farms, 117 NLRB 318.*
>
> "In order to protect employees fom arbitrary invasion of their rights, the Board has prohibited employers and unions from including employees in a multiemployer unit contrary to the wishes of a majority in any constitutent unit. [citations omitted]"

The philosophy expressed by the General Counsel in that case and by the courts in the cases subsequently discussed in the ALR note is a correct analysis of the crucial factors involved, namely, that where the employers voluntarily wish to enter into a joint bargaining relationship approval should be granted cautiously because of the danger of violating the rights of the employees involved. And we think it evident that the same caution should be exercised for the same reason before forcing unwilling employers to enter into joint bargaining. We regret the Board changed its attitude in the instant case.

We think a consideration of these problems indicates an obvious conclusion—the Board should never require employers to bargain jointly except in two instances: (1) where the employers have voluntarily agreed to bargain jointly, or (2) where the evidence is clear and convincing that one employer does in fact have the right to and does control the labor relations policies of the others; and where there are any doubts, they should be resolved in favor of independence in bargaining, not in favor of joint bargaining.

We think that at one time this was clearly the Board's position. But this case, and recent decisions of the

Board in other cases, indicate that the Board no longer adopts this policy. For the recent opinions of the Board, which we will discuss more thoroughly later in this brief, seem to say that if the Licensor and Licensees in a retail establishment such as K-Mart give to the public the appearance of a single integrated operation, then the employers must bargain jointly—one of the more remarkable *non sequiturs* in modern legal history. And we think this case illustrates that the Board either is going to require joint employer bargaining when there is such an appearance to the public or that it is going to resolve all doubts in favor of joint bargaining when it considers the records in each case; and if there is a single clause, or word, or action, which, by the widest stretch of legal imagination, could be found to indicate an influence by one employer upon another, that the joint employer relationship must be observed. No other conclusion is possible when the record in this case is carefully reviewed. For that record, which we would like to discuss now, was almost totally ignored by the Board in making a finding that K-Mart and its Licensees were "joint employers".

B. The Board's Order That K-Mart Should Be Forced Against Its Will to Bargain as a Joint Employer With Its Licensees Is Based Upon an Erroneous Determination That K-Mart Controls the Labor Relations Policies of Its Licensees, Which Determination Is Based Upon an Improper Legal Interpretation of the License Agreement Under Which the Parties Operated.

1. The License Agreement Did Not Give K-Mart the Right to Control or Influence the Labor Relations Policies of the Licensees.

The standard K-Mart License Agreement signed by the parties when considered as a whole not only does not give K-Mart control of the labor relations policies of the Licensees—it specifically contradicts this.

The second paragraph of Section 22 of the License Agreement shows that the parties did not intend to create a joint employer relationship. It reads:

> "The parties do not intend this Agreement to constitute a joint venture, partnership, or lease and nothing herein shall be construed to create such a relationship." [Vol. III, G.C. Ex. 2(c), Employer's Ex. 1, p. 8].

No other conclusion can be drawn from a reading of this language.

In 1964 the Board found, on virtually identical language in a License Agreement, that no joint employer relationship existed. In *Bab-Rand Co.,* 147 NLRB 247, 249 (1964) the Board stated this with respect to the License Agreement there involved:

> "The record clearly establishes, and we find, that White Front and the Employer are not joint employers.[4] [Citing S.A.G.E. Inc. of Houston, 146 NLRB 325] Thus, the License Agreement executed by them specifically provides that: '*This agreement is not intended to create and shall not be considered as creating any partnership relationship between the parties hereto* or any relationship between them other than that of Licensor and Licensee * * *. In addition, neither the contract nor the License Agreement provides for the common handling of labor relations for the Employers' employees. To the contrary, the agreement provides that if the Licensee becomes involved in any labor difficulty as a result of which the store is threatened with being picketed the Licensor shall have the right to terminate the License Agreement upon 24 hours' written notice, given at any time after such threat is received by it or such picketing is commenced." (Emphasis supplied).

If the names of the parties were changed, the above statement could apply in this case.

All paragraph 9 of the License Agreement says the same thing. It reads:

> "*Use of Name.* The Licensee shall conduct its sales on the premises solely under the name of K-mart. The Licensee, however, may neither pledge the credit, incur any obligation or liability, *hire any employees,* nor purchase any merchandise or services under the name of the Licensor or K-mart, it being understood that *neither party to this Agreement shall act as the agent, servant or employer of the other party.*" (Emphasis supplied). [Vol. III, G.C. Ex. 2(c), Employer's Ex. 1, p. 4].

In 1964 the Board found that the existence of this language in a License Agreement precluded a finding of a joint employer relationship. In *S.A.G.E. Inc. of Houston,* 146 NLRB 325, 327 (1964), the Board stated this with respect to similar language:

> "The license agreement specifically provides that *neither party shall hold itself out to be or act as the agent, servant, or employee of the other and that the relationship between the two parties shall be only that of licensor and licensee.*" (Emphasis supplied).

If the names of the parties were changed, the above statement could apply in this case.

The conclusion that the parties intended to run their own labor matters is further strengthened from other language in the License Agreement. Quite obviously the License Agreement was drawn on the assumption that employees of the Licensees were to remain such and were not to become the employees of K-Mart. For example, paragraph 4 covering statutory obligations to employees contains a clause under which the Licensee agrees to comply with statutory requirements relating to "its employees." [Vol. III, G.C. Ex. 2(c), Employer's Ex. 1, p. 3]. And paragraph 6 relat-

ing to cash registers refers to both "Licensees' employees" and "Licensor's employees" [p. 4]. Paragraph 19 relating to the Licensor being relieved of public liability by the Licensees refers to damages caused by "employees of the other party" [p. 6].

A reading of the License Agreement as a whole, and a fair consideration of the provisions therein show that this was primarily an agreement to control the merchandising policies of the Licensees and, to the extent that it touched upon personnel matters, it merely established minimum standards of decorum and conduct necessary for a proper retail operation. Nowhere in the License Agreement has K-Mart reserved to itself, directly or indirectly, the right to control the hiring or firing of Licensee employees; or the right to control the discipline of any Licensee employees; or the right to determine or dictate the rates of pay or fringe benefits of Licensee employees; or the right to give direct orders to Licensee employees; or the right to dictate, direct, influence or control any segment of the Licensees' labor relations policies. This in itself is highly significant. For certainly if K-Mart wanted control in these areas it would not have omitted language covering these important areas. Under ordinary principles of contract law, a contract which is silent in these areas would hardly be construed by a court to mean that the Licensees have given up such a valuable right. For in turning over control of labor relations policies the Licensees would be turning over to K-Mart control of an important segment of their operating costs. And it hardly needs the citation of authority to tell this Court that in the discount retail business where slim profit margins are the rule, the control of costs is of paramount importance. Such control would not be given up lightly, and certainly not without express language in the License Agreement.

It should also be kept in mind that in the retailing field there are two schools of thought concerning the Licensor's control of the Licensees' labor relations policies. In our Discussion of the Facts of the License Agreement at the beginning of this brief we referred to examples of License Agreements which specifically reserved to the Licensor control of the labor policies of the Licensees or controlled the negotiation and execution of labor contracts. S. S. Kresge Company does not subscribe to this philosophy. As we have said before, it does not want to control the labor relations policies of its Licensees. It does not think it now has that power. And it does not want the Board or a Court to give it that power. We belong, in other words, to the other school of thought which believes that the Licenses should be responsible for their own labor relations policies.

2. The Rules and Regulations Promulgated Under K-Mart's License Agreement Did Not Exercise Control Over or Influence the Labor Relations Policy of the Licensees.

K-Mart has reserved to itself under paragraph 10 of its License Agreement the right to issue Rules and Regulations "consistent with this License Agreement" [Vol. III, G.C. Ex. 2(c), Employer's Ex. 1, p. 4]. K-Mart exercised this right and issued a standard set of such Rules and Regulations [Vol. III, G.C. Ex. 2-(c), Employer's Ex. 2].

Here, as with the License Agreement, a fair reading of this set of Rules and Regulations taken as a whole indicates great emphasis upon the details of a retailing relationship, plus certain minimum standards of conduct applicable to all employees in the store whether they work for K-Mart or for one of the Licensees. The majority of rules apply to such things as the use of the trademark "K-Mart"; telephone listings, han-

dling of exchanges and complaints, shoplifting, lost and found problems, signs, pricing, storage, and similar matters.

However, paragraph 10 of the License Agreement permits Rules and Regulations to cover matters relating to "employment practices, personnel, and store policies." The Board seems to feel that the mere use of this clause gave K-Mart tight control over the labor policies of the Licensees. This is an unwarranted extension of the meaning of this language when it is read against the background on the other language in the License Agreement (in particular the language which specifically denies the joint employer relationship which we discussed above), and a recognition that the same paragraph 10 stated that the Rules and Regulations had to be "consistent with this License Agreement" [Vol. III, G.C. Ex. 2(c), Employer's Ex. 1, p. 4].

The extent of the Rules and Regulations themselves show what the parties intended by the quoted clause in paragraph 10 of the License Agreement. For K-Mart did exercise the right which it had reserved therein by issuing certain rules on matters relating to "employment practices, personnel, and store policies." None of these, however, in any way exercised control of matters commonly thought to be labor relations matters. These were rules establishing standards of conduct relating to loud talking, chewing gum, excessive makeup, talking with friends, and similar matters; there were rules establishing minimum standards for appearance and apparel; there were rules relating to matters of common interest to all employees in the K-Mart having to do with purses, smoking, attitude towards customers, parking of personal cars, etc. The only regulations which, by any stretch of the imagination, related to matters normally considered to be labor relations matters made it clear that the Licensees remained in charge of their own labor relations. These were:

1. *Discipline.* On page 1 of the Rules & Regulations, the subject of "Discipline" was covered. This provision limited itself to minimum standards of conduct relating to male and female employees, chewing gum, loud talking, visiting with friends, and so forth. Nothing in this section gave K-Mart the right to discipline employees of the Licensees.

2. *Hiring and Firing.* This subject was also covered on page 1, "Employment", but the right to hire and fire, certainly a fundamental of an employer's labor policies, was expressly retained in the Licensee.

3. *Labor Disputes.* This subject was covered on page 2 under the heading "General Operation of Store" in subparagraph (C) thereof where it was agreed the Licensee would "Not permit the continuance of a labor dispute involving its department which materially affects the sales or threatens the operation of other Licensees or Licensor." A clause like this would, of course, be expected in a License Agreement. If a labor dispute by one Licensee affected the operation of K-Mart itself and of the other Licensees, then quite obviously the labor troubles of one Licensee became the labor troubles of all Licensees—exactly the opposite of what the parties intended. So it is not surprising that a clause such as this was included. What is significant is that the language applies only to a labor dispute which "materially affects" either K-Mart itself or the other Licensees, the minimum requirement necessary to protect K-Mart and the other Licensees; even more importantly, K-Mart was not given the right to dictate the terms of any settlement, this being left to the Licensee itself.

In 1964 the Board found no joint employer relationship under virtually identical circumstances. In *Bab-Rand Co.,* 147 NLRB 247, 249, the Board said:

> "In addition, neither the contract nor the License Agreement provides for the common handling of

labor relations for the Employers' employees. To the contrary, the agreement provides that if the Licensee becomes involved in any labor difficulty as a result of which the store is threatened with being picketed the Licensor shall have the right to terminate the License Agreement upon 24 hours' written notice, given at any time after such threat is received by it or such picketing is commenced."

So it can be seen that while the Rules and Regulations do touch upon certain personnel matters in that they establish certain minimum standards of conduct and control general matters of day-to-day activity, they do not relate to labor relations matters except to make plain that these are being left under the control of the Licensees.

C. The Board's Order That K-Mart Should Be Forced Against Its Will to Bargain as a Joint Employer With Its Licensees Is Based Upon an Erroneous Determination That K-Mart Controlled the Labor Relations Policies of Its Licensees, and Is a Conclusion Which Is Not Supported by Substantial Evidence on the Record Considered as a Whole.

The Board says that K-Mart dominated the labor relations policies of its Licensees. There is nothing in the record to support this. On the contrary the undisputed testimony as to the conduct of the parties flatly contradicts this. Rather than summarizing we think a direct quote of uncontradicted testimony will best show what the parties believed about control of labor policies of the Licensees. At the hearing before Max Steinfeld, the Hearing Officer in the underlying representation case, Mr. Sanger, Director of K-Marts for Kresge's western region, testified as follows [Vol. II-A, pp. 38-58]:

"Q. [By Mr. Tobin for K-Mart] In each of these stores [Commerce, San Fernando, Montclair,

Westminster, Santa Ana, and Cosa Mesa, California] where the particular licensees may have space and employees of their own, do these employees report to any of your supervisors? A. [By Mr. Sanger, Director of K-Marts for Kresge's western region] They do not.

Q. Do your supervisors supervise them in any way? A. They do not.

Q. Does your office in Los Angeles keep records of any of these employees of the licensees? A. We do not.

Q. Does your office in Detroit keep records of any kind of any of these employees of the licensees? A. They do not [Tr. p. 39]. . . .

Q. Do you have any records supplied to you of the names of any of the licensees in any of your stores in the ordinary course of business? A. I do not. . . .

Q. Do you have any idea of the number of employees that these licensees have? A. I have an approximate idea.

Q. And how did you obtain this estimate or approximation? A. By seeing them in the store [Tr. p. 40]. . . .

Q. Now, do the supervisors of K-Mart have any supervisory authority over the employees of the concessionaires? A. They do not.

Q. Do the supervisors of the concessionaires have any authority over the employees of K-Mart? A. They do not [Tr. p. 45].

Q. Who hires the supervisors of K-Mart? A. The manager of the particular store.

Q. Who hires the supervisors of the concessionaries, if you know? A. The concessionaries do but exactly who does it, I don't know.

Q. Who hires the employees of K-Mart? A. Through the K-Mart manager, the personnel lady hires them.

Q. Who hires the the [sic] employees of the concessionaires? A. Their supervisors.

Q. Does K-Mart in any way control who will be hired by the concessionaires? A. We do not.

Q. Can K-Mart discharge an employee of a concessionaire? A. We cannot.

Q. Who pays the unemployment compensation taxes or assessments for the employees of K-Mart? A. The Company, the S. S. Kresge Company.

Q. Who pays the workmen's compensation? A. The S. S. Kresge Company.

Q. Who pays old age assistance or any other Federal or State taxes? A. The Kresge Company.

Q. Does Kresge Company or K-Mart pay any of those aforementioned taxes or assessments for the employees of any [Tr. p. 47] concessionaire? A. They do not.

Q. Who keeps the time cards of the concessionaires? A. If they are kept, they do.

Q. Well, do you keep the time cards of any of the concessionaires? A. We do not.

Q. Who pays the payroll withholding taxes of the concessionaires' employees? A. They do.

Q. Who determines what wage an employee of the concessionaire will receive? A. They do.

Q. Who determines what hours of an employee of a concessionaire will work? A. They do.

Q. Who determines what store an employee of a concessionaire will work? A. They do.

Q. Who determines how many employees any particular concessionaire will have? A. They do.

Q. Who determines what a concessionaire will charge, what prices will be for the concessionaire's goods? A. They do. [Tr. p. 49]. . . .

Q. Who makes out the payroll checks for the employees of the concessionaires? A. The concessionaires do.

Q. Do the concessionaires have the same or different bank accounts from K-Mart? A. Different.

Q. Who handles the incoming freight for the the [sic] concessionaires? A. They do.

Q. An employee on the payroll of K-Mart, does he work at any time for any of the concessionaires? A. No.

Q. An employee on the payroll of any of the concessionaires [Tr. p. 50] mentioned, do they work on K-Mart work? A. No.

Q. You stated that you didn't know how employees of the concessionaires are assigned or where they are assigned to work or for how long. Is that correct? A. That's right. [Tr. p. 51]. . . .

Q. Where is the wage rate of the K-Mart employees determined, what source ? A. Mr. Teninga's office. [Kresge's Regional Manager, Western Region].

Q. Do you know where the wage rate of any of the employees of the concessionaires is determined? A. I do not know exactly where it is determined. I imagine it comes out of their home office.

Q. Do the employees, if you know, of the concessionaires have any benefits, fringe benefits of any type that the [Tr. p. 52] employees of K-Mart do not have ? A. They do have.

Q. Now, do the employees of K-Mart have any benefits that the employees of concessionaires do not have? A. They do have. . . .

Q. Do you have a Blue Cross plan available to your employees, K-Mart employees? A. We do have.

Q. May the employees of the licensees, concessionaires, participate in that? A. They cannot.

Q. Do you have a stock purchase plan of the K-Mart employees? A. We do have.

Q. May the employees of the licensees, concessionaires, participate in that? A. They cannot.

Q. Do you have a group insurance plan for the K-Mart [Tr. p. 53] employees? A. We do have.

Q. Do the employees of the concessionaires, licensees, participate in that? A. They cannot.

Q. Who determines the vacation periods of K-Mart employees? A. Vacation periods are set by our Detroit office through the Vice President in charge of personnel, also in Detroit.

Q. Who determines, if you know, the vacation periods of the employees of the concessionaries? A. I don't know, but I assume it comes out of their home office.

Q. The benefits, vacation benefits afforded by K-Mart to its employees are the same benefits afforded, or are they different, regarding vacations of employees of the concessionaries? A. I could not answer that because there are different vacation schedules for different licensees.

Q. Do you have anything to do with the vacation schedules of the licensees? A. I do not have.

Q. Do you have anything to do with the holiday schedules of the licensees, as to whether or not their employees are paid or whether or not they get particular days off? A. I do not have [Tr. p. 54].

Q. Does K-Mart or any of its supervisors have any authority to tell any employees of the concessionaire of the time he or she should come to work? A. No.

Q. Are there times when K-Mart employees are working that concessionaire employees are not working? A. Yes.

Q. Are the concessions in operation the same hours as the K-Mart store is in operation? A. No . . .

Q. Are there times when K-Mart is open that certain licensees do not have any employees in their particular concessions? A. Yes. . . . [Tr. p. 55].

Q. To digress just a moment, do you know the profits that are made by any of the concessionaries? Does your company know the profits made by the concessionaries? A We do not and to the best of my knowledge they do not.

Q. Meaning your company? A. Yes, sir.

Q. So as far as you know, you don't know? A. Yes.

Q. Do you know whether concessionaire employees begin in the same wage rate as K-Mart employees? A. I could not say definitely.

Q. Do you know? A. I do not know.

Q. Do you know whether the maximum rate for sales personnel is the same as yours, meaning K-Mart employees? A. It could or could not, but I wouldn't know for sure.

Q. They don't supply you information on their wages; is [Tr. p. 56] that correct? A. They do not.

Q. Do you know what experience and qualifications the employees of the concessionaires must have, if any? A. Yes. I would know there are certain departments that must have qualified help and what those qualifications would have to be—

Q. Are those greater or less or different from the qualifications and experience of employees of K-Mart? A. Is some cases it would be greater.

Q. Would it be different in some cases aside from the cases it is greater? A. Yes, it could be.

Q. Now, do you know whether the concessionaires have any supervisors who go from store to store who supervise the personnel of their

concessions? A. They do have. . . . [Tr. p. 57].

Q. When you say 'helping them run their departments,' do they have charge of the personnel of those departments? Do they supervise the personnel of those departments besides doing merchandising? A. They do.

Q. Do they handle the personnel or merchandise of more than these four stores named in this petition? A. Yes.

Q. Do they handle stores aside from K-Mart stores? [Tr. p. 58]. A. Some do and some don't.

Q. Do these—I will call them roving supervisors—do these roving supervisors check in with K-Mart? A. They do not.

Q. Are they given any directions by K-Mart? A. They are not.

Q. Do the supervisors or managers of these concessionaires who work in the stores at all times or at all times that the concessions are open, do they report to any supervisor of K-Mart? A. No.

Q. Do they report to your office? A. They do not."

This is powerful testimony. It requires no comment. None of this testimony was contradicted. None of it was impeached. No other evidence given at the hearing casts even a slight doubt on its accuracy. And yet this testimony is supposed to be a description of a Licensor controlling and dominating the labor relations policies of its Licensees. It actually shows that K-Mart was almost indifferent to the labor relations policies of its Licensees except for the minimum standards of conduct expected of everyone.

The Board ignored this testimony completely.

D. The Conclusion of the Board and Its Regional Director That K-Mart Should Be Forced Against Its Will to Bargain as a Joint Employer With Its Licensees Is Erroneously Based Upon Facts Not in the Present Record and Is the Result of Improper Conclusions Not Supported by the Record in This Proceeding; and It Represents the Abandonment of a Long Standing and Sound Basis for Determining Joint Employer Cases in Retail Establishments and the Adoption of an Unsound Basis Without Articulating the Reasons for the Change in Policy.

The outcome of this case at the Board level was surprising. For the determination that K-Mart and its Licensees must bargain as "joint employers" ignored the written terms of the License Agreement signed by the parties and actually rewrote the Agreement; it distorted the terms of the Rules and Regulations which were issued pursuant to the License Agreement and overlooked those terms which clearly and specifically left all segments of the Licensees' labor relations policies under the control of the Licensees; it totally ignored the undisputed testimony given at the hearing below which showed that K-Mart not only did not dominate or control the labor relations policies of the Licensees, but virtually ignored them. In addition, the Regional Director and the Board apparently applied (we cannot be sure because the Board has never told us) an improper and unsound rule of collective bargaining which seems to be applicable to all Licensor-Licensees relationships in the retail field, namely, that if the Licensor and Licensees hold themselves out to the public as a single enterprise then they must bargain jointly with a union.

To understand this result we must first review the somewhat unusual legal path that this case took and

the circumstances under which a determination was erroneously made that K-Mart dominated the labor relations policies of its Licensees. And we must then trace the changing attitude and philosophy of the Board in retail Licensor-Licensee cases and its sudden change from a sound rule to an artificial and improper rule, a change for which no clear and articulate reason has yet been given.

1. The Conclusion of the Board and Its Regional Director That K-Mart Should Be Forced Against Its Will to Bargain as a Joint Employer With Its Licensees Is Erroneously Based Upon Facts Not in the Record and Is the Result of Improper Conclusions Not Supported by the Record in This Proceeding.

Let us first consider the somewhat unique situation under which K-Mart and its Licensees find themselves required to bargain with a union as "joint employers".

The genesis of the Board's final determination in this case was a prior case involving a 1963 union election at the Commerce K-Mart. The Retail Clerks on February 21, 1963, petitioned for an election in the Southern California K-Marts then consisting of the stores in San Fernando and Commerce (21-RC-8194). The Decision and Direction of Election was made on May 6, 1963 by Ralph E. Kennedy, Regional Director for the 21st Region. He ruled that "each of the Licensees and the K-Mart are the joint employers of the employees in each of their respective departments." He accordingly determined on an appropriate bargaining unit consisting of K-Mart employees and employees of the various Licensees.

An analysis of the Regional Director's reasons for the joint employer finding is interesting. He first emphasizes the common appearance of the operation to the public and the K-Mart control of certain phases of the retailing operations in this language:

> "The appearance of a single department store is preserved through these license agreements by which K-Mart retains control over all advertising, retains the right to audit the records of the licensee retains control over the physical layout of the store, and handles all complaints, exchanges and refunds through its service desk. The license agreement also prohibits the display of the trade names of the individual licensees. There is no physical participation of departments. All merchandise is registered at a central checkout area on K-Mart registers and wrapped in similar wrapping material furnished by K-Mart. All credit must be approved by K-Mart."

Note that this language doesn't say a single thing about K-Mart's control of Licensees' labor relations or even of routine personnel matters.

The Regional Director then did comment briefly upon matters that involve personnel policies when he said this:

> "Moreover, and in furtherance of K-Mart's intention of creating the appearance of a single integrated store, the licensee agrees to keep open during the hours established by K-Mart. Under the license agreements, K-Mart can make rules and regulations governing employment practices, personnel and store policies. All employees punch the same time clock."

The first sentence refers only to the hours that the Licensee must keep the counters open. There was no finding made as to the hours worked by the employees.

The second sentence is almost a quote from paragraph 10 of the License Agreement. Here, admittedly, K-Mart retained the right to issue Rules and Regulations "consistent with this License Agreement" and which could cover, among other things, "employment practices, personnel, and store policies": but we have already analyzed the License Agreement and the Rules and Regula-

tions and have shown that this particular phrase, particularly when read in the context of the remaining provisions of both the License Agreement and the Rules and Regulations, does not give K-Mart control of the labor relations policies of any Licensee.

The Regional Director then concluded by commenting that all employees punch the same time clock. We fail to see how punching the same time clock indicates that K-Mart controls the labor relations of its Licensees. The undisputed testimony at the hearing in the instant case was that K-Mart has nothing to do with the time cards of the Licensee employees; Mr. Sanger, Director of K-Marts for Kresge's western region, testified as follows:

> "Q. Who keeps the time cards of the concessionaires? A. If they are kept, they do.
>
> Q. Well, do you keep the time cards of any of the concessionaires? A. We do not." [Vol. II-A, p. 47].

The Regional Director, having recited at length a series of irrelevant and erroneous reasons for finding that K-Mart controlled the labor relations policies of the Licensees, then cited three cases which do not apply to this situation. In his footnote 3 he cited: *Spartan Department Stores,* 140 NLRB No. 59; *Frostco Super Save Stores, Inc.,* 138 NLRB No. 14; and *United Stores of America,* 138 NLRB No. 45. As with the Regional Director's logic, these bear examination.

In *Spartan Department Stores, supra,* [now cited 140 NLRB 608 (1963)] the License Agreement specifically subjected all employees of all Licensees to all labor relations policies set by the Licensor, authorized the Licensor to discharge employees of the Licensees, authorized the Licensor to adjust any labor dispute involving a Licensee, and required the Licensees to comply with the terms and conditions of employment, hours,

vacation policy, collective bargaining, and union affiliation, as established by the Licensor. No such control exists at the Commerce K-Mart.

In *Frostco Super Save Stores, Inc.* [now cited 138 NLRB 125 (1962)] the License Agreement specifically provided that Licensor was to be present at and participate in labor contract negotiations, and further provided that Licensor held the power over the execution of any labor contract by the Licensee. No such control exists at the Commerce K-Mart.

In *United Stores of America* [now cited 138 NLRB 383 (1962)] the License Agreement specifically covered the subject of labor relations and provided that no Licensee could negotiate with any labor organization without the written consent of Licensor and, in addition, Licensor was authorized to discharge employees of the Licensee. No such control exists at the Commerce K-Mart.

With this decision of the Regional Director of May 6, 1963, based as it was upon fallacious reasoning and Board precedent which wasn't controlling, the error commenced. It was compounded in later proceedings.

It happened that sometime prior to this, about December 20, 1962, S. S. Kresge Company had decided that employees of its K-Mart Division should be paid time and one-half for Sunday work. This was not immediately applied in the K-Marts in California for a variety of legitimate business reasons. On April 21, 1963—about a month and a half before the first election in the Commerce K-Mart—this Sunday pay policy was put into effect at the Commerce K-Mart by Kresge. Mr. Smith, who was the manager of the K-Mart and an employee of S. S. Kresge Company, had posted a notice on the employees' bulletin board on April 16, 1963, advising of the pending institution of premium pay for Sunday work. At that time he also mentioned this to

Mr. Owens, who was manager of the shoe licensee and suggested to Owens that he should contact his superiors to see whether the licensee would like to pay the same Sunday rate. Owens did contact his superiors and they determined to go along with the Kresge policy. As a result the shoe department employees were first paid Sunday premium pay for their work on May 26, 1963, a date ten days before the union election.

On June 5, 1963, the Board election was held and the union lost. The union then filed objections to the conduct of K-Mart and of the shoe department licensee prior to the election, their Objection No. 1, referring to the institution by both of them of Sunday premium pay at a time shortly before the election. The Regional Director overruled all of the union's objections except for objection No. 1.

After certain legal proceedings not here relevant, a hearing was held between November 4 and November 26, 1963, before Hearing Officer Howard D. Fabrick. This hearing, of course, was not to go into the question of the appropriate unit but merely to determine whether the institution of Sunday premium pay by either K-Mart or the shoe department licensee interfered with a free election. Mr. Fabrick found that, because the original determination of S. S. Kresge Company to institute premium pay had been made in 1962 and the delays in announcing it and putting it into effect at the Commerce K-Mart were based upon legitimate business reasons, K-Mart's institution of this premium pay was not grounds for setting aside the election. However, he ruled that these excuses did not apply to the shoe department licensee and accordingly recommended that the election be set aside on the grounds that the institution of Sunday premium pay came during the "critical period before the election" and therefore was improper. Exceptions were filed by K-Mart asd

the shoe department licensee and the matter was submitted to the Board for determination.

On June 24, 1964, the Board overruled the union's objection No. 1 in its entirety and certified the result of the June 5, 1963 election. This decision, Case 21-RC-8194, is unpublished. The Board found that because K-Mart and the shoe licensee were "joint employers" K-Mart's institution of Sunday premium pay was also the shoe licensee's, which made the latter's activities proper.

The reasoning of the Board, as with the language and reasoning of the Regional Director, bears some analysis. It must be remembered that the Board issued its Opinion, not in a proceeding which was to determine the appropriate bargaining unit, but in connection with overruling union objections to an unsuccessful union election.

In this decision the Board first of all noted that Smith, K-Mart's manager, had talked to Owens, the shoe department manager, about the raise at the time that Smith first posted the notice for the benefit of K-Mart employees on April 16, 1963, saying:

> "On the same day Smith advised Owens, manager of the licensed shoe department, that he should contact his superior about paying the same rate to employees within the latter department for Sunday work. The record further shows that Owens agreed to do so, and had several later conversations with Smith about the matter."

This quoted language said in slightly different form what the Hearing Officer, Fabrick, had found when he said in his Recommendation: "Smith testified that on or about April 16, 1963, he told Owens about Teninga's (the Western Regional Manager of S. S. Kresge) directive and suggested that Owens contact his superiors with respect to his personnel."

Secondly, the Board, as with its Regional Director continued to emphasize the common retailing characterisics of the Commerce K-Mart and, interestingly enough, paid even less attention to the question as to whether K-Mart controlled the labor relations policies of the Licensees than had its Regional Director, the Board first stating:

> "As found by the Regional Director in his Decision and Direction of Election, the City of Commerce store here involved is operated as a single, integrated department store by K-Mart, a Kresge subsidiary, and the several licensees pursuant to substantially uniform agreements with K-Mart. Under these agreements, K-Mart preserved the appearance of a single department store, without any reference whatever to the trade names of the individual licensees. It controlled all advertising and the physical store layout, and handled all complaints, exchanges and refunds through its service desk. All merchandise was registered at a central check-out area on K-Mart registers and wrapped in K-Mart paper. K-Mart retained the right to audit the records of the licensees and approved all extensions of credit."

This says nothing about control of labor relations policies.

The only comment that the Board made having to do with either labor relations or personnel policies was contained in the single sentence, which reads:

> "Under the agreement, K-Mart had the power to make rules and regulations governing employment practices, personnel, and store policies."

And all this does is paraphrase a portion of paragraph 10 of the License Agreement between the parties. Note that there is no analysis of the License Agreement or the Rules and Regulations. There is no comment from

the Board about the provisions therein that the hiring and firing of Licensee employees was retained by the Licensee, nor any comment about the labor disputes clause which the Board had only recently found so significant in *S.A.G.E. Inc. of Houston, supra,* nor any review of the matters typically considered to be labor relations policies and which were not covered, such as the Board had so recently and ably done in *Bab-Rand Co., supra.* The Board's Opinion avoided one mistake of its Regional Director's Decision, it did not cite inapplicable Board precedent; in fact it did not cite any authority whatsoever.

Nor did the Board in the course of its Opinion find any facts relating to the contracts between Smith, manager of the Commerce K-Mart and Owens, manager of the licensee shoe department upon which it could base a determination of labor relations control. They merely commented in passing that Smith "advised" (the Hearing Officer had said he "suggested") Owens, manager of the licensed shoe department to contact his superiors. The Board made no finding, as its Regional Director had made no finding, that Smith ordered, or directed, or pressured, or even strongly urged, Owens to contact his Licensee employer. Nor did the Board find, any more than its Regional Director had found, that the decision of the shoe department licensee was anything but an independent decision made by an independent business organization. The record is free of any evidence of control or strong influence or pressure by K-Mart upon the shoe department licensee in making this decision.

About six months after the above Board decision the Retail Clerks Union filed its instant petition for election in the Commerce, California store (21-RC-9309) and also had pending petitions for election in the San Fernando, Santa Ana, and Westminster, California K-Marts which were by that time all in operation. The

four petitions for elections in the four K-Marts were consolidated for hearing on January 18 and January 19, 1965 before Hearing Officer Max Steinfeld. At this time K-Mart took the position, as it had taken in the 1963 election, that the appropriate unit should consist only of K-Mart employees and should not include Licensee employees—this on the basis that it was not a joint employer with the Licensees and did not control their labor relations. The union, as it had in the 1963 election, took the position that the appropriate bargaining unit should consist of both K-Mart and Licensee employees.

Following the hearing, the matter was presented to Regional Director Kennedy, for a determination of the appropriate unit—the same Regional Director who had decided the 1963 election. Here the original error was compounded. For on February 24, 1965 he issued his Decision and Direction of Election in the Westminster case (21-RC-9128), the Santa Ana case (21-RC-9130) and the Commerce case (21-RC-9309). He again found that K-Mart and its Licensees were "joint employers" in the following language:

> "The licensed departments are integrated into the general operations of the stores and are unidentifiable. Under the license agreements, K-Mart retains control over advertising and merchandise, retains the right to audit the records of the licensees, retains control over the physical layout of the store and handles all complaints, exchanges and refunds through its service desk. All credit is approved by K-Mart. In addition, the licenses require the licensees to comply with rules and regulations which the licensor promulgates. They may cover such subjects as employment practices, personnel and store policies, and pricing of merchandise. The rules and regulations now in effect between K-Mart and each licensee allow K-Mart to take applications of per-

sons desiring employment with the licensees and require the licensor and the licensee to check with each other before hiring a present employee or former employee of the other. Under these rules and regulations, the licensee agrees to operate its department during hours established by the licensor and not to continue a labor dispute which materially affects the sales or operations of other licensees or the licensor, and employees of the licensees are required to attend sales and training meetings.

"In view of the above, I find that each of the foregoing licensees and K-Mart are joint employers of the employees in each of their respective departments. In a Decision and Direction of Election dated May 6, 1963, in *K-Mart, a Division of S. S. Kresge Company,* Case No. 21-RC-8194 (unreported), I made a similar finding. Nothing presented in the instant case compels a different finding. Cf. *Frostco Super Save Stores, Inc.* 138 NLRB 125; *Spartan Department Stores,* 140 NLRB 608." [Vol. III, G.C. Ex. 5(a)].

If this language is put alongside the Regional Director's language in his original Decision and Direction of Election, dated May 6, 1963, at the time of the first election at the Commerce K-Mart (21-RC-8194) it will be seen that it is a virtual restatement of his earlier comments with a few additions which apparently were designed to bolster his weak reasoning. He really has added only two comments: (1) the fact that the Rules and Regulations "allowed K-Mart to take applications of persons desiring employment with the Licensees and required the Licensor and Licensee to check with each other before hiring a present employee or former employee of the other" and (2) that "* * * employees of the Licensees are required to attend sales and training meetings."

As to his first comment, the precise language respecting employment and employment applications appears on page 1 of the Rules and Regulations and consists of the second and third paragraphs of the section headed "Employment". These paragraphs read:

> "The K-Mart personnel supervisor will take applications of persons desiring employment. Upon request, these applications will be made available to Licensee's manager."
>
> "Neither Licensor nor Licensee will hire an employee or former employee of the other without first checking with Licensor or Licensee." [Vol. III, G.C. Ex. 2(c) Employer's Ex. 2, p. 1].

What the Regional Director, inadvertently or otherwise, failed to note was the first paragraph under that same heading which specifically reserves to the Licensees the right to do their own hiring and firing. This paragraph reads:

> "All hiring and terminations, so far as they apply to each Licensee, will be under the supervision of the Licensee's manager."

With respect to his second new comment, namely, that Licensees' employees are required to attend sales and training meetings, we concede there is a sentence on page 3 which reads:

> "Licensee's employees shall attend briefing and training sessions to familiarize themselves with store policies and regulations pertaining to the conduct of the business in their department, as well as the entire operation." [Vol. III, G.C. Ex. 2(c), Employer's Ex. 2, p. 3].

Language of this sort is hardly surprising in a retail operation such as a K-Mart and quite obviously is aimed at familiarizing all employees of all merchants in K-Marts with certain business practices and requirements.

It hardly is an attempt by K-Mart to control the labor relations policies of a Licensee. The Regional Director again overlooked the entire tenor of the License Agreement and of the Rules and Regulations, did not even comment on the various positive statements in the License Agreement which showed that labor relations control was left to the individual Licensee, and seemed to be motivated mostly by his 1963 decision.

There was perhaps one slight improvement in the 1965 Opinion over the 1963 Opinion: this time he only cited two inapplicable Board cases as precedent, rather than three, noting *Frostco Super Save Stores, Inc. supra,* and *Spartan Department Stores, supra,* but omitting *United Stores of America, supra.*

In addition, each of the criticisms we have made previously about the 1963 Opinion could be repeated with respect to the 1965 Opinion of the Regional Director.

K-Mart, as it had consistently done, disagreed vigorously with Regional Director Kennedy that it dominated the labor relations policies of its Licensees and therefore should be forced to bargain jointly with them, and on March 5, 1965, filed a Request for Review of the Regional Director's Decision. The Board refused to grant this Request for Review.

On April 7, 1965, the election was conducted and the union "won", 38 to 37. K-Mart refused the union's request to bargain based upon, among other reasons, its disagreement with the finding of the appropriate unit. In the course of the unfair labor practice hearing (based upon the refusal to bargain) which ensued, K-Mart attempted to reopen the subject of the appropriate unit but the Board refused on the grounds that it had been fully litigated prior to the election. It was from the Board's finding of K-Mart's alleged unfair labor practice in refusing to meet with the union that this appeal was taken.

2. **The Conclusion of the Board and Its Regional Director That K-Mart Should Be Forced Against Its Will to Bargain as a Joint Employer With Its Licensees Represents the Abandonment of a Long Standing and Sound Basis for Determining Joint Employer Cases in Retail Establishments and the Adoption of an Unsound Basis Without Articulating the Reasons for the Change in Policy.**

The Regional Director, and the Board have repeatedly emphasized that K-Mart appears to the public to be one enterprise operated by one merchant and used this as a basis for the conclusion that K-Mart exercises control over the labor relations policies of its Licensees. We consider this a remarkable *non sequitur*. And yet in the recent case of *Thriftown, Inc.* 161 NLRB No. 42 (1966) the Board appears to be adopting such a rule so that in retail establishments like K-Mart it will make a finding of a joint employer relationship no matter what the License Agreement says or the conduct of the parties shows. The Board in this case determined that there was a joint employer relationship so patently ignoring the precedent contained in such cases as *S.A.G.E. Inc., Bab-Rand Co.,* and *Esgro Anaheim, Inc., supra,* that one is forced to the conclusion that the real, though unstated, reason for its decision is the application of this new philosophy expounded in *Thriftown, Inc.* It is our belief that the philosophy expressed in *Thriftown* is unsound, the reasons for the change in the philosophy of the Board have not been properly articulated as required by the Supreme Court and serious constitutional questions have been raised by the application of this new philosophy.

Here is the history of the Board's policies in this area. For many years the Board had a well reasoned and well defined policy for determining that a joint employer relationship existed. Typical examples are:

Atlantic Mills Serving Corp., 117 NLRB 65 (1957); *Erlanger Dry Goods Co.,* 107 NLRB 23 (1953); *Block & Kuhl Dept. Store,* 83 NLRB 418 (1949).

The Board put the rule this way: "* * * the question as to whether the lessor or lessee is the employer of leased department employees in this type of case is determined by which of the two *has the primary right of control over matters fundamental to the employment relationship." Duanes Miami Corporation,* 119 NLRB 1331, 1334 (1958). (Emphasis supplied).

And underlying this rule was the policy long held by the Board as to what constitutes the essentials of an employer-employee relationship.

> "The decisive elements in establishing an employer-employee relationship are complete control over the hiring, discharge, discipline and promotion of employees, rates of pay, supervision and determination of policy matters." *Roane-Anderson,* 95 NLRB 1501, 1503 (1951).

The Circuit Courts of Appeal repeatedly approved these criteria for determining the existence of an employer-employee relationship. See *Continental Bus System, Inc. v. NLBR,* 325 F. 2d 267 (10th Cir. 1963); *NLRB v. Howard Johnson,* 317 F. 2d 1 (3rd Cir. 1963) (quoting with approval the language from *Roane-Anderson, supra,* which we have set forth above); *Site Oil Co. v. NLRB,* 319 F. 2d 86 (8th Cir. 1963), *NLRB v. Condensor Corporation,* 128 F. 2d 67 (3rd Cir. 1942) and cases there cited.

The Board doctrine received its most precise delineation in a series of Board cases in 1964: *S.A.G.E. Inc.,* 146 NLRB 325 (1964); *Bab-Rand Co.,* 147 NLRB 247 (1964) and *Esgro Anaheim, Inc.,* 150 NLRB 401 (1964).

In *S.A.G.E. Inc., supra,* while the License Agreement there involved was not set out in full, the Board gives

a detailed description of it at pages 326 and 327, and it has every appearance of being closely identical in substance to the K-Mart License Agreement. Much of the control of the *retail* activities was retained by *S.A.G.E.* just as K-Mart does, and the Board said at page 327:

> "The current effect of License Agreements is to create the impression among store customers that they are dealing with a single company and not with individual enterprises sharing space in a single store building."

But the Board then went on to point out:

> "Although S.A.G.E. exercises close control over the operational policies of the licensees, it does not exercise similar control over the labor policies of the latter. Each licensee hires, discharges, and disciplines the employees in his department, determines their wage rates and other monetary benefits, and establishes their working conditions. Each licensee also lists the employees in the department on his own payroll and makes the standard payroll deductions for such items as social security and income tax withholding. The license agreement specifically provides that neither party shall hold itself out to be or act as the agent, servant, or employee of the other and that the relationship between the two parties shall be only that of licensor and licensee."

Shortly thereafter in *Bab-Rand Co., supra,* which involved the White Front Stores, Inc., a chain of retail operations on the west coast, the Board cited and reaffirmed the principles of *S.A.G.E.,* and the reasoning behind those principles, stating at page 249:

> "The record clearly establishes, and we find, that White Front and the Employer are not joint employers. Thus, the license agreement executed by them specifically provided that 'this agreement is not intended to create and shall not be considered

as creating any partnership relationship between the parties hereto, or any relationship between them other than that of Licensor and Licensee. . . .' In addition, neither the contract nor the license agreement provides for the common handling of labor relations for the Employer's employees. To the contrary, the agreement provides that if the licensee becomes involved in any labor difficulty as a result of which the store is threatened with being picketed, the licensor shall have the right to terminate the license agreement upon 24 hours' written notice, given at any time after such threat is received by it or such picketing is commenced. Further, the Employer hires and discharges the snackbar employees and sets their wage rates; there is no interchange of snackbar employees with any White Front employees; and their seniority is separate from that of White Front employees. The fact that the Employer's employees have certain working conditions in common with the employees of White Front is due to the fact that the operations of both employers are housed in the same stores, and does not arise from the license agreement."

Later in the same year, 1964, the Board continued its adherence to the policies enunciated in *S.A.G.E.* and *Bab-Rand Co.,* in the case of *Esgro Anaheim, Inc., supra.* Again a White Front store was involved. Beginning at page 404 the Board said this about the relationship of White Front and its licensee:

"As to these matters, the record shows that Esgro does, in fact, hire and discharge its own employees, and sets their wage rates. Esgro also determines their work and vacation schedules. Without consultation with White Front, it grants fringe benefits, which are available only to its employees, and which do not arise from either the contract or license

agreement. There is no interchange of Esgro's employees with any White Front employees, or those of other licensees, and the contract provides that their seniority is to be separate from that of White Front employees. Such control as White Front exercises over Esgro's operations appears to be limited to the extent necessary for efficient operation of the White Front stores and to give the appearance to the public of one integrated retail operation. The license agreement further provides that 'this agreement is not intended to create and shall not be considered as creating any partnership relationship between the parties hereto, or any relationship between them other than that of Licensor and Licensee. . . .' Neither the contract nor the license agreement provides for the common handling of labor relations for Esgro's employees, and there is no evidence to show that such joint control was contemplated. While the Retail Clerks points out articles of the license agreement governing the operation of the licensee's department as an integral department of the store, it has not shown that White Front has exercised control over Esgro's employees so as to affect their working conditions or tenure of employment. Nor has any evidence been produced to show that White Front has ever had any part in settling grievances of Esgro's employees."

The applicability of these cases to the Commerce K-Mart factual situation becomes even more striking if the License Agreement and Rules and Regulations used by White Front and its licensees are studied in detail. Quite obviously White Front exercised a great deal tighter control over its licensees than did K-Mart [See the License Agreement, Vol. III, G.C. Ex. 6, pp. 21-22; and the Rules and Regulations, G.C. Ex. 6, Appendix "C"].

We think it beyond argument that if the Board had followed *S.A.G.E., Bab-Rand* and *Esgro* in the instant case it would not and could not have found a joint employer relationship.

It was in the *Esgro* case that, for the first time, a dissent was noted to the Board policy with respect to licensor-licensee situations in department stores. Members Brown and Jenkins dissented, saying at page 409:

> "The record thus discloses a retail leased department operation of a type which has become a commonplace method of conducting a department store business. Generally speaking, the lessor establishes the store and holds himself out to the public as the sole entrepreneur, whereas in fact some or all of the departments are operated by lessees who assume some of the risk."

These two Board members then concluded, even though they had made no finding that the licensor, White Front, dominated or controlled the labor policies of the licensees, that White Front and its licensees should be required to bargain as joint employers. The *non sequitur* had finally appeared. Because the public thinks there is only one merchant, all the merchants in the store must bargain as one. Nothing is said about the problems that this philosophy could create at the bargaining table. Nothing is said about the impairment of the contract between the licensor and the licensees. These same two Board members also dissented in *Triumph Sales, Inc.,* 154 NLRB 916 (1965) when the majority continued to follow the traditional philosophy.

Finally, in *Thriftown, Inc.,* 161 NLRB No. 44 (1966), the minority view became the majority view of the Board. The majority recited at length the contractual relationship between the parties in Thriftown, a subsidiary of the Kroger Company, finding, among other things, that licensees controlled their own labor relations in such matters as hiring, firing and disci-

plining employees, determining wages, rates of pay, and other benefits, etc. They then made the statement, after commenting that a strike against one licensee will "almost necessarily adversely affect the operation of the entire store":

> "It follows, therefore that the owner of the discount store, *in some manner* will retain sufficient control over the operations of each department so that it will be in a position to take those steps necessary to remove the causes for the disruption in store operations." (Emphasis supplied).

A truly astounding statement. Apparently the Board is going to find that the Licensors always have "in some manner" retained control of the labor policies of the licensees no matter what the License Agreement says, and no matter what the conduct of the parties may indicate. It is this reasoning and logic which permeates the instant case. It is this reasoning and logic to which K-Mart takes vigorous exception.

A withering dissent was filed by two members of the Board, which is so powerful and so well put, that K-Mart adopts it in its entirety and attaches it hereto as Appendix "A".

For the convenience of the court we have prepared and attached to this brief as Appendix "B" a chart of the principal retail Licensor-Licensee cases decided by the Board. The chart indicates the criteria which the Board has considered relevant in each case listed, with respect to a determination on the joint-employer question. It can readily be seen from this chart that the Board, commencing with the instant case, but more clearly articulated in Thriftown, has shifted from the long-established rule that a joint-employer finding can only be substantiated by a showing of control over labor relations and has, in this case, and subsequently, based its decision upon appearances to the public. Significantly, the chart also illustrates that at the time S. S.

Kresge drafted the License Agreement in issue in the case at bar, under existing and well established case law, the Board would not have found a joint-employer relationship.

The Board in *Thriftown,* as well as in this case, abruptly changed its long established rule relating to licensors and licensees without clearly articulating the reasons for the sudden change. This failure on the part of the Board violates the requirement imposed on it by the Supreme Court in *NLRB v. Metropolitan Life Insurance Company,* 380 U.S. 438 (1965) and similar cases, such as *NLRB v. Tallahassee Coca-Cola Bottling Co. Inc.,* .... F. 2d ...., 5th Cir., August 8, 1967. It is submitted that the failure of the Board to articulate its reasoning is because such reasoning is contrary to the dictates and policy of the Act.

The underlying flaw in the Board's order and the philosophy behind it, as exemplified in both the instant and *Thriftown* cases, lies in the fact that its enforcement would create several serious and perplexing, indeed insoluble, problems. There can be no question, we submit, that the Board has, *sub silentio,* overruled the *Sage, Inc., Bab-Rand Co.,* and *Esgro Anaheim* line of cases. In so doing, the Board has apparently made it impossible in the discount operation field for K-Mart and others similarly situated to draft a license agreement which will prevent a Board determination that they are joint employers with their licensees. The Board has no right to establish a rule of law which effectively precludes a separate employer relationship in this area of commerce when one is desired and intended by the parties. Such is the case here.

The Board's action is particularly aggravating in that K-Mart has taken every possible measure to maintain an independent relationship vis-a-vis its licensees and prepared and executed the license agreement in question prior to the change of philosophy manifested in this

case and thereafter in *Thriftown*. When this case is stripped to its essentials, there is no question but that the Board was strongly influenced by the fact that K-Mart and its licensees present the appearance of an integrated operation to the public.

We urge that such a policy unconstitutionally impairs K-Mart's freedom of contract, totally disregards the intent of the parties to the license agreement, and deprives them of due process protections. The Board's order is, therefore, violative of the record, intentions of the parties, statutory law, logic and constitutional safeguards.

E. The Board Erroneously and Improperly Certified the Union as Bargaining Representative When, in Fact, Its Election "Victory" Was the Direct Result of Threats, Coercion and Misrepresentation.

Preliminary Statement.

Another critical error committed by the Board in the instant case was its certification of the Union as bargaining representative for employees of K-Mart and its licensees despite conclusive evidence that the Union had, during its pre-election campaign, threatened, coerced and intimidated employees in the bargaining unit and had further induced votes by means of material misrepresentations of fact and law. A summary of the record with respect to Union campaign activity demonstrates that the Union's illegal conduct impaired employee free choice and upset those "laboratory conditions" without which no election can be said to have truly reflected employee sentiment.

Following the election in the underlying representation case, No. 21-RC-9309, held on April 7, 1965, which the Union "won" by a single vote—38-37, K-Mart filed timely objections to the election, together with a Memorandum of Points and Authorities in Sup-

port thereof [Vol. III, G.C. Ex. 16; 21]. These objections, six in number, were directed at a broad range of electioneering violations attributable to the Union.

Thus, K-Mart alleged that during the months of March and April 1965, Union agents had coerced and intimidated K-Mart employees by threatening loss of jobs if they did not join or support the Union [Vol. III, G.C. Ex. 16, Objection 1]; that during those same months in 1965, Union agents threatened K-Mart employees with physical and other reprisals and engaged in constant surveillance of their activities, thereby creating an atmosphere of fear, prejudicially affecting the election [Vol. III, G.C. Ex. 16, Objection 2]; that Union representatives engaged in a planned scheme of misrepresentation, including distributing a leaflet to K-Mart employees containing deliberately false and misleading statements of wage comparisons between K-Mart and unionized stores (Objection 3); that false representations were made concerning payment of Union dues (Objection 4); that on election day, false and misleading statements of fact and law were made to one or more K-Mart employees (Objection 6); and finally, that the Union engaged in wrongful and deliberate inducements for votes by waiving Union initiation fees contingent on the outcome of the election (Objection 5).

In support of the foregoing objections K-Mart offered documentary evidence [Vol. III, G.C. Ex. 21, Exs. G, H, I, J and K] as well as the affidavits of Williams, Crabtree, Bloomfield, Cooper, Castanon, Reyes and Platteborze, individuals employed at the K-Mart store [Vol. III, G.C Ex. 21, Exs. A, B, C, D, E, F and L].

On June 30, 1965, the Board's Regional Director issued his Supplemental Decision sustaining K-Mart's

Objection 3, outlined above, but overruling, out of hand, all of the remaining objections raised [Vol. III, G.C. Ex. 28(a)]. Subsequently, the Board granted the Union's Request for Review, denied K-Mart's Request for Review [Vol. III, G.C. Ex. 35] overruled the Regional Director with regard to Objection 3, and certified the Union [Vol. III, G.C. Ex. 40].

It is to be noted that the position taken by the Regional Director on Objections 1, 2 and 6 was far different from that taken by the Board on review of those very same objections. The Regional Director agreed that the listed violations, if proved true, were substantial and material, clearly warranting the setting aside of the election. He overruled the enumerated objections simply because *he did not believe the accuracy of the allegations of K-Mart's witnesses as set forth in their affidavits.* That the Regional Director made credibility findings is both undisputed and indisputable. For example, in support of Objection 6, K-Mart offered the affidavit and handwritten notes of employee Platteborze, evidencing gross misrepresentations made on election day by a Union agent in response to her questions [Vol. III, G.C. Ex. 21, Ex. L]. In disposing of this objection, the Regional Director stated:

> *"The answers, as the employee wrote them down, do contain misstatements concerning legal rights of employees and the Petitioner's (Union's) engagements in strikes in the past.* The union representatives denied making the misrepresentations attributed to them. *I credit their denial,"*[5] [Vol. III, G.C. Ex. 28(a), p. 9] (Emphasis added).

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[5]Similar credibility findings were made by the Regional Director with respect to Objections 1 and 2. In each instance allegations of K-Mart witnesses that they, or other employees, were threatened, coerced and intimidated by Union agents were disbelieved solely because those allegations were denied by others [Vol. III, G.C. Ex. 28(a), pp. 5-6].

Yet at no time did the Regional Director, or the Board, see fit to direct a hearing for the purpose of resolving these conflicts in testimony, as required by due process of law and the Board's own Rules and Regulations (See Sec. 102.69(c), (d)). Findings of Fact were made by the Regional Director *ex parte,* based solely on the affidavits attached to K-Mart's Memorandum and on the Regional Director's private investigation. No opportunity has ever been afforded K-Mart to present its witnesses in person or to conduct cross-examination of adverse witnesses. There can be no doubt under the law that the unilateral action of the Regional Director constituted a clear abuse of discretion and denied to K-Mart even minimum standards necessary to insure procedural due process.[6]

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[6]As will be demonstrated in more detail *infra,* K-Mart's objections raised substantial and material issues of fact, which, if given credence, would clearly have invalidated the election. Under such circumstances it has been deemed imperative that a hearing be conducted at some stage of the administrative proceeding before the objecting party's rights can be affected by an enforcement order. *NLRB v. Bata Shoe Co. Inc.,* 377 F. 2d 821 (4th Cir. 1967), and cases there cited.

A solid line of court authority supporting this proposition has been cited by K-Mart at every turn but completely disregarded by the Board. A review of the cases shows how firmly K-Mart's right to a hearing has been established. For example, *NLRB v. Poinsett Lumber & Mfg. Co.,* 221 F. 2d 121 (4th Cir. 1955) is virtually indistinguishable from the case at bar. There, too, an employer raised substantial questions relating to Union threats and intimidations, by way of objections to an election. Nonetheless, the Union was certified after an *ex parte* investigation and the employer, as here, was deprived of a right to a hearing. The Court concluded that the employer had not received the full and fair hearing before the Board guaranteed him by law and remanded the case with direction to hear the evidence offered by the Company bearing on the validity of the election.

Similar reasoning is found in the opinions of many circuits. See, for example, *NLRB v. Lord Baltimore Press, Inc.,* 300 F. 2d 671 (4th Cir. 1962); *NLRB v. Joclin Mfg. Co.,* 314 F. 2d 627 (2d Cir. 1963); *NLRB v. Sidran,* 181 F. 2d 671 (5th Cir. 1950); *NLRB v. Dallas City Packing Co.,* 230 F. 2d 708

The Board's approval of this "star chamber" procedure has been continuously challenged throughout this case. On July 12, 1965, K-Mart filed its Exceptions to and Request for Review, in part, of the Regional Director's Supplemental Decision [Vol. III, G.C. Ex. 32], and urged that since it had not been granted a hearing as to vital issues upon which a conflict of evidence was apparent the Board should resolve the matter by directing such a hearing [Vol. III, G.C. Ex. 32, pp. 7-9; 10-11; 25-27]. The Board denied this Request for Review by telegram on July 21, 1965 [Vol. III, G.C. Ex. 35].

Again, during the hearing before the Trial Examiner, K-Mart, in timely fashion, raised its failure to receive a hearing on objections to the election as a ground of defense to the refusal to bargain levied by the Union [Vol. II, Tr. 13, lines 17-25]. Indeed, the General Counsel conceded that K-Mart had never received a hearing and alluded to the numerous briefs filed by K-Mart in [Vol. II, Tr. 22, lines 3-16]. Nonetheless, the Trial Examiner, allegedly adhering to Board policy, refused to consider at all the validity of K-Mart's objections to the election in view of the prior Board ruling on these objections in the representation case [Vol. I, p. 308]. Finally, on review to the Board from the Trial Examiner's decision, K-Mart once again urged in its brief as prejudicial error the denial, at all stages of this proceeding, of its right to present witnesses and to have their credibility determined in a hearing as required by due process of law.

At the end of this odyssey and apparently as a response to the controlling authority cited by K-Mart con-

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(5th Cir. 1956); *NLRB v. Staub Cleaners*, 357 F. 2d 1 (2d Cir. 1966); *NLRB v. Capital Bakers*, 351 F. 2d 45 (3rd Cir. 1965); *U.S. Rubber Co. v. NLRB*, 373 F. 2d 602 (5th Cir. 1967); *Home Town Foods, Inc., v. NLRB*, ... F. 2d ..... (5th Cir. 1967) Daily Labor Report No. 128, BNA July 3, 1967.

firming its legal right to a hearing at *some* stage of the case, the Board has taken the position, in its Decision [Vol. I, pp. 324-25] that no hearing was required because the Union's conduct was insufficient to warrant setting aside the election, *even assuming that such conduct occurred precisely as K-Mart witnesses alleged.*[7]

Like the man who has painted himself into a corner, the Board had two choices, neither very palatable: one was to repaint the floor (*i.e.,* belatedly direct a hearing), the other was to break down the wall (*i.e.,* ignore all precedent and hold coercive and threatening conduct unobjectionable). The Board obviously chose the latter course.

The issue now before this Court, then, is *not* whether K-Mart was entitled to a hearing on its objections but, rather, whether the Union conduct complained of, assuming now that it occurred just as K-Mart witnesses have alleged can, in law, conceivably be condoned or sanctioned in an election campaign.

Each of K-Mart's objections will, therefore, be discussed herein to counter the Board's all but incredible conclusion that threatening, coercive and misleading conduct on the part of the Union was not sufficient to justify invalidation of the election.

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[7]This remarkable position is set forth in footnote 1 to the Board's Decision: "In determining upon the requests for review whether the Employers' objections raised substantial and material issues of fact, the Board in accordance with its usual practice viewed the evidence in a light most favorable to the Employer-objectors and did not rely on any 'credibility resolutions'. Thus, the Board assumed the accuracy of the allegations of objectionable conduct as reported by the Employers' witnesses, and concluded that this conduct, if it happened as alleged, would be insufficient to warrant setting aside the election. Accordingly, the Board decided that a hearing was not necessary and that the objections were properly overruled. We here reaffirm the aforesaid ruling." [Vol. I, p. 325].

1. **The Board Committed Error in Overruling Its Regional Director, Who Determined That the Union Made a Material Misrepresentation of Fact Concerning Wage Rates Which Affected the Results of the Election.**

On the evening prior to the election, April 6, 1965, the Union distributed to K-Mart employees handbills which purportedly compared wage rates of certain K-Mart job classifications with those at rival union discount stores [Vol. III, G.C. Ex. 21, Ex. G]. In pertinent part, these leaflets contained the following chart:

Job	Wages Paid	
	K-Mart	Union
Checker	$1.80	$2.35
Houseware	1.80	2.20
Stock Room	1.80	2.10
Payroll Clerk	1.80	2.30

K-Mart contended, and the Regional Director found, that the leaflet incorporated false and misleading information on a matter of crucial inportance to employees—wages—which materially affected the results of the election. Specifically, the Union totally failed to tell employees of K-Mart, indeed gave no intimation whatsoever, that the listed "Union" rates were the *highest* of four wage categories in each job classification and *did not apply to employees until they had at least one year's experience or service.*

The evidence also showed that a substantial number of K-Mart employees had less than one year of employment and were clearly misled by this false union propaganda. The matters misrepresented were, as the Regional Director found, within the special knowledge of the Union and of such a nature that employees would have no independent means for evaluating them. Moreover, K-Mart had insufficient time to reply in view of the brief period remaining between the distribution of

the leaflets and the time of the election [Vol. III, G.C. Ex. 28[a] pp. 7-8].

On September 9, 1965, the Board, after granting review of the Regional Director's determination, reversed him and overruled the objection *even though conceding that the circular was in fact misleading and false.* [Vol. III, G.C. Ex. 40]. In so doing, the Board placed express reliance on two factors—(1) that some 10 days or more prior to its dissemination of the false leaflet, the Union had distributed a truthful one on the same subject, and (2) that K-Mart employees could have verified the accuracy of statements contained therein by inquiring of employees at nearby unionized stores [Vol. III, G.C. Ex. 40, p. 3]. The Board concluded, therefore, that the leaflet did not constitute a basis for setting aside the election.

K-Mart respectfully submits that no such conclusion is permissible on this record. Indeed, the rationale for the Board's decision borders on the frivolous. Established precedent, sound policy and the best interests of the employees all require that the Regional Director's original ruling should have been sustained. We contend that this issue is squarely controlled by the Board's own decision in *Hollywood Ceramics,* 140 NLRB 221 (1962). In that case, as here, the subject matter of the handbills distributed was wage rates, a subject the Board stressed to be of utmost concern to employees; there, as here, the employer's rates were understated and the recital of union rates omitted significant considerations (*i.e.,* the union there failed to make it clear that the "union scale" included an incentive factor, and indicated that its figures covered only base rates); the misstatements were disseminated among employees on election eve as were the instant misstatements—too late for meaningful rebuttal or response. In setting aside the election, the Board declared:

> "We are satisfied that the Petitioner violated the standards we have set forth. The handbill in question concerned wage rates, a matter of utmost concern to the employees, and the timing of its distribution was such as to prevent any reply to the handbill. Therefore, any substantial misrepresentation *could well have significantly affected the election results*. We conclude further the leaflet did convey a substantially erroneous picture of the comparative wage situation." (Emphasis added). (*Id.* at p. 225).

There can be no doubt that the Union's statements in this case also could "well have significantly affected" the election results.

The Board's decision in *Hollywood Ceramics* finds its Circuit Court counterpart in *U.S. Rubber Co. v. NLRB,* .... F. 2d .... (5th Cir., 1967) which similarly involved a misleading comparison made between wages and conditions at a union versus a non-union plant. The Fifth Circuit invalidated the election because of this deception, quoting with approval language of *NLRB v. Houston Chronicle Publishing Co.,* 300 F. 2d 273 (5th Cir., 1962) which is equally applicable here: "Purportedly authoritative and truthful assertions concerning wages . . . of the character of those made in this case are not mere prattle; they are the stuff of life for Unions and members, the selfsame subjects concerning which men organize and elect their representatives to bargain." To the same effect, see *Celanese Corp. v. NLRB,* 279 F. 2d 204 (7th Cir. 1960); *Ore-Ida Foods, Inc.,* 160 NLRB 102 (1966).

The decision of the court in *Graphic Arts Finishing Co., Inc. v. NLRB* .... F. 2d .... (4th Cir. 1967) Daily Labor Report No. 151, BNA, August 4, 1967, is directly in point. Twenty-four hours prior to the election, the union distributed a circular which listed wage rates allegedly being paid under union contracts. In reality,

the rates were a composite of those paid under various contracts in a geographic area other than that in which the employer did business. Moreover, no particular company in that area actually paid the rates listed in the circular.

This deception was the basis for denial of the Board's order over the latter's contention that the circular had an "insubstantial" impact on the election, the court stating:

> "In the instant case there was no opportunity to reply to the misstatement and the election was close; a switch of only five votes would have resulted in a union defeat. *The misrepresentation concerned subjects even more vital than those in Bonnie Enterprises* [*341 F. 2d 712 4th Cir. 1965*] *because here they dealt, in part, with wages. A misrepresentation of $.33 an hour with respect to apprentices' wages represents $13.00 per week and more than $600.00 per year. It appears beyond question that such a figure is material and would significantly affect the free choice of the employees. See Bok, Regulating NLRA Election Tactics, 78 Har. L. Rev. 38, 90 (1964).*" (Emphasis supplied).

See also,

> *NLRB v. Houston Chronicle Publishing Co., supra; Cleveland Trencher Co.,* 130 NLRB 600 (1961)

There is no meaningful ground for distinction between these cases and the one presently under consideration. In none of the cited cases were the statements "untruthful", *per se.* But they were half-truths; like the statements here involved, they concealed important information unfavorable to the party distributing them, while purporting to be a complete disclosure of all the facts.

The Board, as we have previously recited, reasoned that the misrepresentation was vitiated because the Union had previously mailed (on March 26, 1965) a detailed list of its wage rates. The thrust of this reasoning seems to be that a previous truthful statement will justify subsequent falsehoods. This might be appropriately dubbed the "relation-forward" doctrine or the principle of "cure-back".

This same argument was bluntly rejected by the Board itself in *Bowman Biscuit Co.,* 123 NLRB 202 (1959). The employer in that case was a division of the National Biscuit Co., which had recently negotiated a contract with the petitioning labor organization. The contract covered seven of the company's plants, but did not include the particular plant involved. On November 4, 1958, three days before the election, and again on the day preceding the election, the Union circulated handbills tending to create the impression that the same contract would become effective at the instant plant upon election of the Union. On the basis of these handbills, the Board ordered the election set aside. The Union had pointed out that on November 5, two days before the election, it had mailed to all the employees documents which revealed that the national contract was not applicable to their plant. Nevertheless, the Board declared:

> "In our opinion the misrepresentation of the true facts not only added prestige to the Petitioner and placed it in an advantageous position but also lowered the standards of campaigning to a level which impaired the untrammeled expression of free choice by the employees in the unit. We find, therefore, that the aforesaid objection raises material and substantial issues concerning conduct affecting the results of the election." (*Id.* at pp. 204-5).

In *Bowman Biscuit,* the "corrective" information was distributed *the day before the misleading circular.* Yet the misrepresentations "lowered the standards of campaigning" to a level which impaired an "untrammeled expression of free choice by the employees." How much less does the Union's "detailed listing", mailed on March 26—some eleven days prior to the election—vitiate the subsequent distortions promulgated on election eve? The answer could hardly be more apparent.

It is never possible, of course, to determine what the employees *actually* believed, nor even what they *probably* believed. But the burden is not on the employer to show that the employees were necessarily misled, rather, only to show that it is sufficiently likely that it cannot be told whether they were or were not. *NLRB v. Trancoa Chemical Corp.,* 303 F. 2d 456, 461 (1st Cir. 1962). Put another way, the test, as delineated in *Bowman Biscuit Co.* is whether the misstatements might "reasonably" have created a false impression. The same standard has been recognized and applied by the Board in the *Walgreen* and *Hollywood Ceramics* cases, *supra,* in *Calidyne, Kawneer,* and *Cleveland Trencher, supra,* and in *Grede Foundries,* 153 NLRB 984 (1965).

In the *Grede* case, the Union had circulated a handbill which stated the *maximum* weekly take-home pay as the *average* under union contracts, and which quoted only the highest hourly rates for skilled employees, the average hourly rates being considerably lower. The Regional Director found the handbill "inaccurate" but considered its effect minimal "when viewed in the context of the entire election campaign." The Board disagreed:

> "[W]e believe that the employees involved could reasonably construe the handbill to set forth the average or representative hourly rates or weekly earnings received under the Petitioner's contracts

> with the named companies rather than the wages of a few top-rate employees. We find, therefore, that the handbill was inaccurate and misleading as to the wages the Petitioner has negotiated—a matter of vital concern to the employees." (Emphasis added). (*Id.* at p. 986).

In light of this test, *i.e.,* whether the employees "could reasonably construe" the Union's handbill as setting forth "the average representative" wages under a union contract, the argument here that an earlier listing can eradicate the subsequent deception is patently without merit. The question, again, is what reasonable employees *might well* have believed. Plainly enough, they could reasonably have construed the Union's handbill of April 6 to indicate the uniform wage under an existing union contract. Indeed, if a doctrine of "cure" or "correction" is to be applied, the employees might reasonably have believed that the first "detailed listing" was inaccurate; that any contradiction between the two communications should be resolved in favor of the more recent one, *i.e.,* the false leaflet circulated the day before the election.

Note, too, that the Union, in its Request for Review to the Board, stated its prior "detailed listing" was mailed, not to every eligible voter, but to "*virtually* every eligible voter." [Vol. III, G.C. Ex. 29, p. 4]. K-Mart wishes to re-emphasize the fact that the election below was decided by one vote only. If a single employee believed the circular distributed on April 6, the result might well have been altered by false impression so created. The Board has consistently held that *each and every* employee is entitled to exercise his free and untrammeled choice in a representation election. See *U.S. Rubber Co.,* 86 NLRB 3, 5 (1949) ("[A]n election fails of its purpose unless it affords to all employees an opportunity to register their free and uncoerced choice

of bargaining representative."); *National Gypsum Co.*, 133 NLRB 1492, 1499 (1961). This policy could only have been given effect in the present case by upholding the Regional Director's Decision and direction of a new election.[8]

Neither were such misrepresentations justified, cured or abrogated by the Board's finding that K-Mart employees could have conducted their own research on the matter. We can only suggest that the Board must have made this statement with "tongue in cheek". The leaflets in question were circulated the day before the election. Surely the Board does not mean to suggest that employees have the burden of going to other employees of other stores (when there is no evidence in the record that such employees were known to K-Mart

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[8]If anything, the Regional Director did not go far enough in stating grounds upon which Objection 3 should have been sustained. He should properly have found that the handbill's false representation that the maximum K-Mart rate was only $1.80 an hour, provided further ground for sustaining this objection, for the evidence established that numerous K-Mart employees received in excess of $1.80. The Regional Director disregarded this falsehood because he believed the store rates were not within the Union's special knowledge and that K-Mart employees possessed independent knowledge with which to evaluate the representation [Vol. III, G.C. Ex. 28(a), p. 7].

First of all, if these rates were not within the Union's knowledge it had no business listing such rates at all. Misrepresentations may be made negligently (with reckless disregard of the facts) as well as deliberately. Moreover, it can hardly be said that the Union was unfamiliar with K-Mart wages. According to its own statements it had discussed wage rates with K-Mart employees in every conceivable manner over a six-month period [Vol. III, G.C. Ex. 29].

As for the employee's alleged ability to "evaluate" such statements, we need only note the Board's prior decision in *Walgreen Co.*, 140 NLRB 1141 (1963) which set aside an election for misrepresentations concerning benefits received by *fellow employees in the same store,* to discern that this conclusion was but makeweight. See also *Cleveland Trencher,* 130 NLRB 600 (1961) and *NLRB v. Bonnie Enterprises,* 341 F. 2d 712 (4th Cir. 1965) regarding misrepresentating benefits of plants in the same area.

personnel or that such discount stores were located nearby) and that they must perform this "duty" within the few hours available to them before the election. This second ground for overruling the Regional Director can only be characterized as absurd.

In view of the uncontradicted facts surrounding K-Mart's Objection No. 3 and the unequivocal law pertaining thereto, to hold K-Mart guilty of an unfair labor practice for refusing to bargain would be contrary to the Act and would foist the Union on K-Mart employees when they have not had an opportunity to exercise a free, informed choice.

2. Prior to the Election, Union Officials Coerced, Threatened and Intimidated K-Mart Employees; These Violations of the Act Require That the Election Be Set Aside.

The Union was not content, during its pre-election campaign with the circulation of misleading information to employees. It went much further. During the months of March and April, 1965, its agents threatened, coerced and intimidated various employees of K-Mart by stating that if they did not join or support, or if they opposed the Union, those employees would lose their jobs. These threats created an atmosphere of fear among those and other K-Mart employees, in violation of their rights as guaranteed in the Act and obviously interfered with the fair conduct of the election as well [Vol. G.C. Ex. 16, Objection No. 1].

In support of its objection, K-Mart supplied the Regional Director with the sworn affidavits of Elaine Williams and Linda Crabtree, two Commerce store employees [Vol. III, G.C. Ex. 21, Exs. "A" and "B", respectively]. The affidavit of Williams, standing alone, provides more than sufficient evidence of the coercive activity engaged in by Union representatives. According to Williams a Union agent,

known only to her as "Leroy" stated to her that, "If you don't join and the union is voted in, you will lose your job." [Vol. III, G.C. Ex. 21, Ex. "A", p. 2].

The Regional Director never reached the question whether this threat, if it occurred, would be sufficient grounds to require that the election be set aside. Rather, he appeared to have overruled this objection on the ground that Williams was not to be believed. This is to some extent surmise, since the claim was rejected with a summary comment, "The undersigned finds insufficient evidence to substantiate the allegation". However, the only reasonable explanation for his rejection is that credit was given to the Union representative who, according to the Regional Director, denied voicing any such threat at all [Vol. III, G.C. Ex. 28(a), p. 6].

Contrary to its Regional Director, the Board some twenty months later, as we have previously noted, began from the premise that K-Mart's witnesses *truthfully* testified as to the conduct of Union agents. For purposes of this argument, therefore, Williams' testimony must be credited. Consequently, the Board is on record to the effect that a direct threat by a known Union representative to an employee that she must join the Union or lose her job is not objectionable conduct! A more ludicrous position and one more destructive of employee rights can hardly be imagined.

This type of "campaign" activity has heretofore been steadily condemned by the Board in a remarkably consistent series of cases handed down since *G. H. Hess, Inc.*, 82 NLRB 463 (1949). There, a Union representative warned an employee, Basnett, that unless she voted for the Union, "the girls will refuse to work with you." On the basis of this remark, the Board found improper interference and ordered the election set aside:

> "The test, as this Board has recently had occasion to note, is whether the statement was reasonably calcu-

lated to have a coercive effect on the listener. In the context in which the statement by Lewis was made, it was reasonably calculated to convey to Basnett the threat that the employee members of the Union would make it intolerable for Basnett to continue in her job. We are of the opinion that this statement was reasonably calculated to restrain and coerce Basnett in the exercise of a free choice of bargaining representative and, as such, exceeded the permissible bounds of Union preelection activities."

More recent cases applying the same fundamental standards, *viz.*, the "free and uncoerced choice of a bargaining representative" are *Caroline Poultry Farms, Inc.*, 104 NLRB 255 (1953) and *Superior Wood Products, Inc.*, 145 NLRB 782 (1964). In *Caroline, supra,* the rival Teamsters and Meat Cutters unions each threatened that if the other was elected, distribution of the employer's product would be disrupted by member locals in New York City and at other distribution points. Such conduct, held the Board, amounted to a threatened loss of employment and was thus undue election interference. The same result obtained in *Superior Wood Products, supra,* where a union official warned that unless the union was elected, employees of the employer's biggest customer (where the same union was bargaining agent) would refuse to handle the employer's goods.

Note that in each case, the threats took the form of rather subtle suggestion. The employee in *G. H. Hess* was not told: "You will lose your job", although the implication was that her associates' uncooperative attitude would produce the result. Similar interpretation was required in *Caroline* and *Superior Wood Products.* The Union agents in the instant case, however, did not engage in delicate indirection. Elaine Williams (as well as Linda Crabtree) was bluntly told that she would

be out of work in the event of a Union victory. If mere intimation, or sly insinuation and allusion, sufficiently impairs "a free and uncoerced choice", how much more is that freedom impaired by undisguised threats of lost employment by Union functionaries plainly confident of success at the polls? The very nature of the circumstances contradicts the notion that any free choice whatever could have been exercised.

Even beyond this, like threats are frequently held *unfair labor practices* in violation of Section 8(b)(1)(A) of the Act. *United Mine Workers of America, etc.,* 143 NLRB 795 (1963) (employee who belonged to rival union was warned that he should quit job); *Montgomery Ward & Co., Inc.,* 142 NLRB 650 (1963) (employee told he must join union to keep job); *NLRB v. International Hod Carriers Union, Local 141,* 295 F. 2d 657 (7th Cir. 1961); *NLRB v. James Thompson & Co.,* 208 F. 2d 743 (2nd Cir. 1953); *NLRB v. International Longshoremen's and Warehousemen's Union,* 210 F. 2d 581 (9th Cir. 1954).

These cases have relevance in light of the Board ruling in *Dal-Tex Optical Co., Inc.,* 137 NLRB 1782 (1962) that an unfair labor practice is *a fortiori* to be treated as election interference:

> "Conduct violative of Section 8(a)(1) is, *a fortiori,* conduct which interferes with the exercise of a free and untrammeled choice in an election. This is so because the test of conduct which may interfere with the 'laboratory conditions' for an election is considerably more restrictive than the test of conduct which amounts to interference, restraint, or coercion which violates Section 8(a)-(1)." (*Id.* at pp. 1786-1787).

A final point should be observed here. In *G. H. Hess Co., supra,* the election was decided by a vote of 25-11. No mention is made in the opinion of challenges sufficient to affect the outcome nor, indeed, of any chal-

lenges at all. The case, moreover, was treated on the assumption that only one employee had been subjected to the objectionable threats; in other words, it was immaterial that the intimidation of a single employee could in no way have changed the election result. Further elaboration of this aspect of *Hess* is found in *U.S. Rubber Co.,* 86 NLRB 315 (1949), where the Board stated:

> "In a recent case [*Hess*] the Board held that an election fails of its purpose unless it affords to *all* employees an opportunity to register their free and uncoerced choice of bargaining representative. In that case, the Board set aside an election on the basis of interference with a single employee. Accordingly, the number of instances of interference, or the number of employees directly involved, are not material to the issue. When, as here, two employees have been interfered with in their choice of a representative, the requirements of a wholly free and uncoerced election have not been fulfilled." (Emphasis by the Board).

See also, *National Gypsum Co.,* 133 NLRB 1492 (1961), citing both *Hess* and *U. S. Rubber Co.* and affirming the principle just stated, as announced in those cases. And see *Vickers, Inc.,* 152 NLRB 793 (1965). The Act, of course, protects *all* employees, as these cases emphasize, and this is particularly true in the posture of an election campaign.

Although the single incident involving Williams provides an ample basis for invalidating the election, a word is in order concerning Crabtree. She testified by affidavit that an unidentified caller told her, ". . . if the union gets in, and you don't vote for us, you'll be looking for another job." [Vol. III G.C. Ex. 21, Exhibit "B"]. The reasons for ignoring Crabtree's statement are nowhere articulated either by the Regional

Director or the Board. We can only assume that this incident was dismissed solely becuase it could not be shown that the caller was authorized to speak for the Union.

Yet either as a matter of logic or law, the issue of agency or authority to speak for the Union is wholly immaterial on objections to an election. In this respect objections must be differentiated from unfair labor practice charges. The latter involve the issuance of corrective orders against employers or unions as entities. Issues of agency are directly related to the central task of the Board in such situations, which is to fix responsibility.

On the other hand, the purpose of a re-run election, the remedy sought by objections, is simply to insure employee free choice. If a threat was in fact made in the name of the Union (and Crabtree's statement was assumed by the Board to be true) the employee is no less coerced simply because she cannot verify with certainty the source of the threat. Indeed, under the rule presumably followed by the Board, either side may indulge in telephoned threats during an election campaign with complete impunity, confident that the victim's inability to make an identification will defeat any objections such threats might raise.

Similar Board reasoning was found wholly unacceptable by the Circuit Court in *NLRB v. Staub Cleaners, Inc.,* 357 F. 2d 1 (2d Cir. 1966). There an employer moved to have an election set aside on the ground that a *rumor* had been circulated that if the union lost the election, Negro employees would be discharged and replaced with whites. The Regional Director found that the rumor originated with a rank-and-file employee, not with the union. Nothing in the record was to the contrary. The Regional Director held that since union responsibility had not been shown, the employer's ob-

jections did not raise substantial or material factual issues with respect to the conduct of the election.

The Second Circuit disagreed, stating that:

> "In so holding, the Regional Director has completely ignored *the doctrine developed by the Board that '[elements, regardless of their source,* which in the experienced judgment of the Board make impossible impartial tests, are *sufficient grounds for the invalidation of an election.' P. D. Gwaltney, Jr. & Co.,* 74 NLRB 371, 373 (1947)." (Emphasis added).

This holding has very recently been reaffirmed by the 5th Circuit in *Home Town Foods, Inc., v. NLRB,* ..... F. 2d ..... (5th Cir. 1967) Daily Labor Report No. 128, BNA, July 3, 1967. The Regional Director had there dismissed six employer objections concerning specific acts of the Union or of Union supporters which allegedly impaired the election. The Board's Regional Director made no findings on the truth of these allegations but concluded that even if they were true the Union could not be held responsible as the conduct was that of rank-and-file employees. The Circuit Court took a contrary view,

> "We are not impressed with the argument that all coercive acts must be shown to be attributable to the union itself, rather the rank and file of its supporters. As the Board has once said, 'The important fact is that such conditions existed and that a free election is hereby rendered impossible.' *Diamond State Poultry Co.,* 1953, 107 NLRB 3, 6."

Here, also, the Board has misconceived the true rule with respect to election campaigns. The fact of the threat to Crabtree (which the Board accepts as true) is sufficient; the source of that threat is immaterial.

In light of the foregoing evidence and authority, all of which has been cited to the Board repeatedly at each

stage of this proceeding below, the Board's summary treatment of objection No. 1 is all but incomprehensible. Initially the Board denied K-Mart's request for a hearing on the matter, thus forcing this reviewing Court to speculate as to what the facts are and what the Board's decision would have been had a hearing been granted. And under its present position, the Board has concluded that the objection raises no substantial issues even if the threats occurred as alleged.

We submit that quite to the contrary, the Board's ruling can be justified only by *ignoring* all of the evidence and all of the authority pertaining to the point. Certainly once the Board *concedes* the accuracy of K-Mart's allegations, as it undoubtedly has, the election cannot be allowed to stand.

3. Union Representatives Engendered Fear in a K-Mart Employee in the Presence of Another Employee by Threats of Physical and Other Reprisals Which Conduct Unquestionably Prevented a Fair Election.

Consistent with the pattern of illegal tactics which is found throughout the pre-election campaign, Union agents, during the months of March and April, 1965, threatened K-Mart employees with physical harm, engendered fear in them by constant surveillance of their activities and thereby prejudicially affected the election [Vol. III, G.C. Ex. 16, Objection No. 2].

In support of its charge with respect to this conduct, K-Mart supplied the Regional Director and the Board with the affidavits of Commerce store workers Gordon Bloomfield [Vol. III, G.C. Ex. 21, Exhibit "C"], V. L. Cooper [Vol. III, G.C. Ex. 21, Exhibit "D"], Michael Castanon [Vol. III, G.C. Ex. 21, Exhibit "E"], and Irene Reyes [Vol. III, G.C. Ex. 21, Exhibit "F"]. Taken together, these affidavits charge that a K-Mart stock boy, Leo Hosey, was told by a Union representative, "You we don't want. You'd better hope that the

Union doesn't get in" or, according to statements made to Messrs. Bloomfield and Cooper by Hosey himself, the Union representative stated, "We know you Leo, and when we get in we'll get you."

As the Regional Director's report states, Hosey himself subsequently denied having been thus threatened by Union representatives and stated in his affidavit to the Board that he told the store manager and others merely that ". . . I was scared of the Union." He added, "I had no reason for this. I just felt that way . . ." Considering Hosey's denial, as well as the denial of the Union representative, the Regional Director concluded that the objection was without merit and overruled it [Vol. III, G.C. Ex. 28[a], p. 6].

The overruling of this objection *ex parte* by the Regional Director, based upon Hosey's "repudiation" and the Union's denial was improper and erroneous in the first instance. To begin with, the Regional Director ignored the fact, as expressed in the affidavits of Bloomfield, Cooper and Reyes, that Hosey during this time and thereafter was in a highly emotional and agitated state of mind and admittedly afraid of the Union. So afraid, we submit, that his repudiation necessitated his asserting that the testimony of Bloomfield, Cooper and others was false. But the statements of these witnesses cannot be categorized as perjury merely because a frightened Hosey repudiated them. They remain probative evidence, particularly under the circumstances.

Certainly, at the very minimum the testimony of co-employee Castanon, a *direct* witness to the threats made by the Union representative, could not be dismissed merely because Hosey later differed. The Act is a public Act. It protects *all* employees, including those who have been coerced into silence or repudiation. It also protects employees, such as Castanon, who may have

been coerced by such open and notorious conduct, even though not directly threatened themselves. Castanon's statement is clear proof of the violation. There is not a scintilla of evidence why such an employee, Castanon, should not be telling the truth. Indeed, under the Board's decision Castanon, it must now be assumed, told the truth concerning this incident.[9]

Thus, there no longer remains a conflict in the evidence on this point between an admittedly frightened employee, on the one hand, and strong impeaching as well as direct creditable contrary evidence, on the other, which would have required a hearing. The Board has conceded that all of K-Mart's witnesses alleged truthfully in their affidavits. *Therefore Hosey was in fact threatened!* Despite the Board's bald assertion to the contrary, once it is assumed that the Union's representative made the statement alleged in the affidavits supplied to the Board by K-Mart, there can be no argument but that such threats clearly constitute more than sufficient grounds for sustaining the objection and setting aside the election. In fact they amount to unfair labor practices.

This view is supported by numerous Board decisions and may be illustrated by language taken from *Checker Taxi Co., Inc.,* 131 NLRB 611, 619-621 (1961).

> "Respondent's agents made other direct threats of violence and recriminatory action to obstruct the organizational activities of DUOC and employee participation in such activities and support for that union. . . .

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[9]In his original decision the Regional Director alluded to Castanon's statement but gave it no credit or even discussion [Vol. III, G.C. Ex. 28(a), p. 6]. The Board denied review in the representation case, *completely* ignoring Castanon's testimony [Vol. III, G.C. Ex. 35]. On appeal from the instant unfair labor practice charge the Board accepted his allegations as true but, enigmatically, gave them no weight whatsoever [Vol. I, p. 325, n. 1].

* * * *

"Somewhat similar to the foregoing generalized threats are a number of veiled threats which, for the most part, the Trial Examiner rejected as being too vague to support finding a violation. However, the ready and overwhelming implication of the statements is, we find, the use of forcible means including resort to bodily harm to convince an employee he should forget about DUOC and working on its behalf. . . .

* * * *

"In sum, then, we find that Respondent Union by the acts set forth above involving the use of force and threats restrained and coerced employees of Respondent Companies in the exercise of the rights guaranteed by Section 7 and, thereby, violated *with respect to each such incident* Section 8(b)(1)(A) of the Act." (pp. 619-622) (Emphasis supplied).

The implied resort to bodily harm was there found in the remark, "Your ulcers will be bothering you" and in the query, "are you married?" How much more does the statement "We'll get you" carry the same "ready and overwhelming implication?" Witness the holding in *Ladies Garment Workers Union,* 146 NLRB 559, 561 (1964):

"The Trial Examiner found, and we agree, that the remark by McMikel [union organizer] 'Let him go *this time.* He is pushing his luck' was a threat and in and of itself a violation of Section 8(b)(1)(A): Its intent was that if Irwin continued to cross the picket line to go to work for the nonunion Susan Evans, he could expect to be assaulted again in the future." (Emphasis in original).

A threat, then, is *in and itself* an 8(b)(1)(A) violation, without regard to the circumstances or background

against which it is made. This point was fully spelled out in *United Sugar Worker's Union, ILA (American Sugar Co.)*, 146 NLRB 154 (1964):

> "We [the Board] agree with the Trial Examiner that the Respondent's president Randazzo, threatened employees with physical violence because of their opposition to Respondent, in finding that such threats were made, we rely only on the words used, and not on the Trial Examiner's conclusion that the 'quiet fashion' in which the statements were made 'was calculated to make them more ominous in their implications."

K-Mart invites attention again to *Dal-Tex Optical Co., Inc.*, 137 NLRB 1782 (1962), which held that conduct amounting to an unfair labor practice is so disruptive of "laboratory conditions" as to automatically constitute election interference; that while the converse is not necessarily true, a Section 8 violation is *a fortiori* grounds for invalidating an election. This principle was applied in *Stern Bros.*, 87 NLRB 16 (1949), to set aside an election for physical violence and threats thereof. See especially *Bloomingdale Bros., Inc.*, 87 NLRB 1326 (1949), where the election was set aside for interference including a statement that "after we win we will take care of you." It is virtually the same statement, *viz.*, "When we get in, we'll get you," on which Employer's Objection 2 is based.

While the threats themselves would have been sufficient justification for invalidating the present election, the Union did not stop with threats. Leo Hosey was placed under open surveillance and followed to and from his place of work [Attached Exhibit "C" and "F"]. This type of activity too, has been harshly criticized by the Board. In the *Checker Taxi* case, *supra,* union officers were followed in cars by rival union agents, and observers were stationed outside their apartments. Such surveillance, according to the Board, restrained the ex-

ercise of rights guaranteed by Section 7, and violated Section 8(b)(1).

Finally, in both objections 1 and 2, the threats of lost employment, and the Union warnings to Hosey, including threatened physical reprisals and maintaining continued surveillance over his activities, created such an atmosphere of fear and confusion among the K-Mart employees as to have a prejudicial effect upon the election. Note that the fact of the threats to Hosey was shortly thereafter communicated to a number of other employess. Hosey himself was in a highly emotional and agitated state at the time. The situation in its totality, taking into account the threatened loss of employment to Elaine Williams, Linda Crabtree and an indeterminate number of others, coul dhave no effect other than one in serious derogation of "laboratory conditions." A very like situation was presented in *Poinsett Lumber and Mfg. Co.,* 116 NLRB 1732 (1956). The specific incidents in that case were (1) a Union organizer told an employee that "she would be sorry" if she did not sign a Union card and that she would lose her job if the Union came in; (2) a Union organizer told another employee that the Union would make it so hard on him he could not work at the plant; and (3) two employees were threatened with physical violence. In setting aside the election, the Board ruled:

> "We are convinced that the threats of personal retaliation and of physical violence made to employees and the concomitant coercive effect thereof, constituted such serious conduct as to interfere with a free and untrammeled choice of representatives contemplated by the Act. Moreover, we find it unnecessary to determine whether or not such serious and coercive conduct can be attributed to the Union because the important fact is that an atmosphere of fear and reprisal existed and that a free election was thereby rendered impossible." (*Id.,* at p. 1739).

It is K-Mart's position that the same rule must prevail in the instant case. Here too, threats of "personal retaliation" and of "physical violence" were made. Employees were led to believe that their job were in jeopardy and the "concomitant coercive effect" is obvious. The only reasonable finding must be that a "free and untrammeled" choice of representatives was rendered impossible.

4. The Union Transmitted False and Misleading Information Via Telephone to a K-Mart Employee on Election Day. The Deception Pertained to Matters so Material as to Require That the Election Be Invalidated.

The Board and its Regional Director further erroneously overruled K-Mart's objection No. 6 which alleged that on the very morning of the election, April 7, 1965, but prior to the time the polls opened, the Union, through its officers, agents and representatives, made false and misleading statements on material matters to an employee of the K-Mart Commerce store [Vol. III, G.C. Ex. 16, Objection No. 6].

A brief review of the pertinent facts demonstrates, contrary to the conclusions reached in Board proceedings below, the major significance and falsity of statements made by a Union agent to 19-year old Carol Platteborze, an employee of the K-Mart Commerce store, which statements were proffered in support of Objection No. 6.

Exhibit "L" to Vol. III, G.C. Ex. 21, is an affidavit signed by Platteborze. As shown by this exhibit, she was telephoned on April 7, 1965—election day—at approximately 10:00 A.M. Her caller was a Union official, urging that she attend the election and cast her ballot. Platteborze "took this opportunity" to ask the representative numerous questions concerning Union membership and activities. Their conversation lasted for two hours. During that time, in response to her ques-

tions, the Union agent, together with another Union organizer, made the misrepresentations set out in Objection No. 6.

Several striking features of this telephone conversation should be noted at the outset. First, the subject employee manifestly considered the matters under discussion to be "material." In point of fact, she had become concerned about these items and so had put the questions into writing. Promptly after the discussion she reduced the answers to written form as well. (A copy of both questions and answers is attached to her affidavit.) The representations can hardly be classified "immaterial" under such circumstances. Regardless of their importance to other employees, they were obviously important to Platteborze. Under the rule stated in *G. H. Hess,* 82 NLRB 463 (1949) *U. S. Rubber Co.,* 86 NLRB 3 (1949), and *National Gypsum Co.,* 133 NLRB 1492 (1961), *all* employees are entitled to make a free and untrammeled choice at a representation election. If a single employee is duped or misled by Union agents, the election cannot stand.

Likewise, it is beyond dispute that the representations made to this employee were within the "special knowledge" of the Union. *Calidyne Co.,* 117 NLRB 1026 (1957); *Kawneer Co.,* 119 NLRB 1460 (1958), and *NLRB v. Trancoa Chemical Corp.,* 303 F. 2d 456 (1st Cir. 1962). Platteborze was thus entitled to rely upon the statements as proceeding from an "authoritative source."

Finally, no serious argument can be advanced that K-Mart—or anyone else—had an opportunity to rebut these statements. The conversation occupied the period from 10:00 A.M. to 12:00 noon, thus ending a scant 4½ hours before the election. The fact that the statements had been made only came to K-Mart's attention late that afternoon. Moreover, many of the state-

ments, such as those concerning Union dues, the Union's history of strikes and its practice of fining members for non-attendance, could not have been evaluated or disproved without Union cooperation. On this point, too, the misrepresentations are within the rule of *Calidyne Co., supra,* and progeny. The only remaining point for discussion is the demonstrable falsity of the statements.

Preliminarily, we must emphasize that again, with this objection, the Regional Director resolved conflicts of evidence *ex parte* without directing a hearing, despite his recognition that this objection, if believed, raised substantial issues. Thus, he stated:

> *"The answers, as the employee wrote them down, do contain misstatements concerning legal rights of employees and [the Union's] engagements in strikes in the past.* The union representatives denied making the misrepresentations attributed to them. *I credit their denial."* [Vol. III, G.C. Ex. 28(a), p. 9]. (Emphasis added).

Clearly then, the Regional Director overruled this objection *solely because he did not believe the allegations of K-Mart's witness, Platteborze.* But in his view, these allegations, if true, presented material misrepresentations of fact and law.[10]

The Board, here implicitly reversing its Regional Director, has adopted precisely the opposite approach.

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[10]The Regional Director concluded that Platteborze had faulty recollection, because she took no notes during the conversation and that it was only "afterwards" that she wrote down the questions and answers as she recalled them [Vol. III, G.C. Ex. 28-(a), p. 9]. In point of fact, however, the Regional Director failed to note that she wrote these questions and answers down within a matter of fifteen minutes after the telephone conversation [Exhibit "L" to Vol. III, G.C. Ex. 21].

As the Regional Director's Supplemental Decision reads, it implies that the store manager requested Platteborze to write

It has assumed that Platteborze told the truth and that the misrepresentations were made just as alleged, but has found that, even so, they provide no warrant for setting the election aside [Vol. I, p. 325, n. 1].

The following examples taken from the numerous misstatements made to Platteborze reveal that this position is absolutely insupportable:

(a) The Union agent advised Platteborze that the "double dues" assessment of Local #770 had been "decided a long time ago by the discount stores to help the food chain markets, so being that K-Mart is a new Union store . . . the decision will have no effect" on K-Mart employees. The Union's own newspaper belies this statement [Vol. III, G.C. Ex. 21, Exhibit "K"]. The article of March 1965, under by-line of Joseph DeSilva, states without qualification that *all* members of the local, in expressing "their contempt" for the "Employer's position", voted 5 to 1 in favor of double dues. In other words, the decision was *not* that of the "discount stores." Nor was the decision a "long time ago"; the article, appearing in March of 1965, observes that the vote was taken at a "jam-packed meeting earlier *this month*", *i.e.,* earlier in March 1965. Likewise, as pointed out *infra* in the discussion of Objection No. 4, there is not a scintilla of evidence to support a conclusion that the decision would "have no effect" on K-Mart employees—all the evidence points the other way.

(b) Numerous statements by the union official refer to the "contract" and to "provisions" thereof. Among

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out the Union representative's answers [Vol. III, G.C. Ex. 28-(a), p. 9] Platteborze's affidavit, however, clearly shows that the assistant manager stated that he would like to see such answers only in response to an inquiry by Platteborze as to whether indeed, he would want to see them [Vol. III, G.C. Ex. 21, Exhibit "L", p. 2].

the terms of this fictitious contract were the following: "Mostly everyone is to work 40 hours"; part-time employees receive "a dime more than the full-time"; part-time workers succeed to openings in a full-time shift on the basis of "seniority". These and other representations were all plainly calculated to emphasize the benefits of union representation. The overriding difficulty is that there was, of course, no collective bargaining agreement in force with K-Mart stores, nor could any terms of such a contract have been ascertained in advance of contract negotiations. These misleading statements were plainly violative of established and approved standards of appropriate campaign techniques. The comment in *Walgreen Co.*, 140 NLRB 1141 (1963), has application. In setting aside an election for union misrepresentations, the Board said:

> "We think that our dissenting colleague overlooks the timing of the handbill and the fact that it misstated the benefits of a *contract not yet reduced to writing.*" (Emphasis supplied).

The "benefits" or other terms alluded to may never be incorporated into a union contract with K-Mart. Employee reliance upon such statements, therefore, may eventually prove to have been wholly misplaced.[11]

(c) It was stated that "Local #770 hasn't had a strike in 25 years." Such an assertion would undoubtedly astonish those employers whose recent labor

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[11]In *NLRB v. Trancoa Chemical Corp.*, 303 F. 2d 456 (1st Cir. 1962), the Union had publicized a certain contract negotiated with another company, without stating that all of its terms rested on a contingency which had never occurred. In other words, there was no such contract. The court found this to be a "manifest misrepresentation", stating pointedly, "We are reminded of the lady who sought to persuade her butcher to meet the price quoted for lamb chops across the street. When asked why she didn't buy there she replied, 'They don't have any'." (*Id.* at p. 459).

difficulties have included intensive strike activity by the Union. In 1959, for example, Local #770 engaged in a month-long strike at the locations of *al* food employers where it was bargaining representative As a matter of fact, one of K-Mart's own licensees—Gallenkamp Shoes—has been subjected to Local #77(strikes within the stated time period.

(d) If an impasse *in negotiations* occurs, and a strike ensues, Platteborze was assured that "all the employees' jobs are given back to them, because it says in the contract that the job must go to those with the most seniority." This statement is false as a matter of law. Under long-standing principles of national labor policy, replacements may be retained on the job following a economic strike.

(e) "The employees are paid", in case of an economic strike, "unemployment for 36 weeks plus 13 weeks, if necessary, so they could be on strike for a year and get paid for it." See *Cal. Unemp. Ins.*, §1262 to the effect that unemployment compensation is not paid to economic strikers.

(f) Platteborze was advised that under an "open shop" agreement, nonunion employees would be paid at a lower rate than Union members. To those knowledgeable, this is patently untrue. See Section 8(a)(3) of the Act. Rank-and-file employees, however, do not ordinarily have such knowledge.

(g) The statement that "30 days after the Union's entry, a decertification Petition can be filed downtown" and the employees could vote the Union out, is seriously misleading. No decertification election, of course, can be held until one year after a previous valid election and then only upon petition of 30 percent of the employees in the unit. Sections 9(c)(3) and 9(e) of the Act.

Again, this reviewing Court will never know what position the Regional Director would have taken had he, in accordance with the law, directed a hearing on the above misrepresentations rather than making an unilateral resolution of credibility in favor of the Union agent who denied the statements *in toto*. But the Board presumably "did not rely on any 'credibility resolutions'." It concluded that such representations could not have materially affected the results of the election [Vol. I, p. 325, n.1].

This conclusion is clearly erroneous as a matter of law. Each of the above misstatements, considered separately, necessitate that the election be set aside. Considered in combination, they overwhelmingly dictate such a result.

This election was decided by a single vote, a circumstance under which Union misrepresentations become all the more aggravated. The cavalier treatment accorded this objection by the Board is wholly unwarranted. It provides ample ground for direction of a new election.

5. The Union Further Violated Fair Campaign Tactics by Inducing Votes in Offering a Waiver of Initiation Fees Contingent on the Union's Winning the Election.

On or about March 26, 1965, and at times thereafter, the Union distributed to employees at the store a letter and card which, taken together, wrongfully and deliberately offered those employees financial inducements for their vote in the coming election in that said card and letter offered to waive the Union initiation fee, *provided* the holder of the card voted for the Union in the election and/or provided the Union was selected [Vol. III, G.C. Ex. 16, Objection 5].

The letter and card, exhibits "I" and "J" to Vol. III, G.C. Ex. 21, contain an objectionable offer to

waive initiation fees in the event of a successful Union election. The card, or so-called "certificate" [Vol. III, G.C. Ex. 21, Exhibit "J"], was distributed among substantially all the employees in advance of the election and carried the legend: "The Bearer, whose name appears on the front of this certificate, shall not be required to pay initiation fees of any kind. . . ." [Vol. III, G.C. Ex. 21, Exhibit "I"], the accompanying letter, further specified:

> "This policy [of waiving initiation fees] shall apply to any K-Mart employee who becomes a member of our Union *as the result of our winning the election* at your store and who is employed there at the time the employees sign their first Union contract." (Emphasis added).

Taken together, the two documents illustrate that the holder of the certificate was to receive a free membership if the Union won the election. Until recently, a sharp distinction had been drawn in the Board decisions between a proposal of this character, considered unlawful, and a mere campaign offer of free memberships in no way conditioned upon the voting or the election results. The latter was considered unobjectionable as a traditional campaign practice not tending to reward or penalize employees on the basis of the vote.

Gruen Watch Co., 108 NLRB 610 (1954).

Quite a different situation, however, is presented here. The "waiver" is extended only to persons who become members "as a result of our winning the election at your store." The case thus falls directly within the exception delineated in *Gruen Watch* and applied by the Board to find interference in *Lobue Bros.,* 109 NLRB 1182 (1954). In *Lobue,* the Union had distributed the following card:

"United Fresh Fruit & Vegetable Workers
Local Industrial Union No. 78-CIO

This is to certify that .....
Name
..... employed
Address
by ..... at .....
Company City
is entitled to a membership book free of initiation fee after election and certification. . . .

....”
Date issued Representative

Objections to the election, based on this offer by the Union to waive fees, were upheld and certification denied:

> "We think there can be no question, on the specific wording of the cards distributed, that the employees who received these cards were to be given free memberships *only if the Petitioner won the election* and was thereafter certified as bargaining representative. We therefore conclude that the question presented here comes squarely within the language of our *Gruen* decision indicating that a pre-election offer of reduced initiation fees is objectionable when the promised benefit is 'contingent on how the employees voted in the election *or* on the results of the election.' Accordingly, we find that the distribution by the Petitioner of these cards as part of its pre-election campaign interfered with the conduct of the election." (Emphasis added). *Id.* at p. 1183.

K-Mart submits that the instant case is exactly the same as *Lobue*. Here, as in that case, the Union circulated certificates to the individual employees; while the wording of the cards is not identical, the accompanying letter specified with no uncertainty that the waiver would be granted only *if the Union wins*. The

letter, of course, in no way abrogates the significance of the cards, but rather provides a detailed explanation of their effect. So *if the Union was elected, the free membership would be granted upon presentation of the card.* This fact is pointed up by the notation that "the bearer" is not required to pay, and that the "certificate will be recognized as valid only if presented to the Union not later than thirty (30) days" after the effective date of an agreement. Note further that the front of the card states: "This certificate is valuable to you. Don't lose it." [Vol. III, G.C. Ex. 21, Exhibit "J"].

Thus, as in *Lobue,* there can be no question, on the specific working of the card distributed, that the employees who received these cards were to be given a free membership only if the Union won the election and was thereafter certified as bargaining representative.

The Regional Director held that *Lobue* did not apply because the offer in the instant proceeding was not conditioned upon how the employee would vote in the election [Vol. III, G.C. Ex. 28[a], p. 9]. But, in so holding, the Regional Director (1) completely sidestepped the fact that the waiver of the initiation fee was unquestionably conditioned on the "result of our [the Union] winning the election" [Vol. III, G.C. Ex. 21, Exhibit "I"] and (2) misread *Gilmore Industries,* 140 NLRB 100 (1962) as well as the other case he relied upon, the later Board case, *Gorbea, Perez & Morell S. en. C.,* 142 NLRB 475 (1963).

In *Gorbea,* the Board did not originally consider the Union's waiver of initiation fees in the circumstances of that case to constitute an exoneration of an 8(a)(5) violation on the part of the employer (133 NLRB 362 [1961]). The Court of Appeals for the First Circuit in effect disagreed with the Board and remanded the case for further findings. (*NLRB v. Gorbea, Perez & Morell S. en. C.,* 300 F. 2d 886 [1963]). On remand,

the Board held that the Union's waiver of initiation fees was not improper in that it was offered as a direct result of the employer's unfair labor practices which made a free election impossible. But, in so holding, the Board in the very same case that the Regional Director in the instant proceeding relies upon, went on to explain the difference between the *Lobue* and *Gilmore* cases. In the course of its opinion, the Board set forth its position (142 NLRB 475, 476 [1963]):

> "The Board has recently had occasion to reaffirm that the practice of offering special reduced initiation fees during an organizational campaign is not, of itself, interference with the conduct of elections. [*Gilmore Industries, Inc.,* 140 NLRB 100]. The Board has held, however, that a reduction or a complete waiver of initiation fees *does* interfere with the conduct of the election when the union's waiver is conditioned on how the employees vote *or on the results of the election.*" [*Lobue Bros.,* 109 NLRB 1182] (Emphasis added).

And the simple, unavoidable fact is that the Union in the instant case offered to waive initiation fees for K-Mart employees conditioned "on the results of the election.[12]

In April 1967, the Board discarded the *Lobue* rule, holding that a Union promise to waive initiation fees if it wins an election is not ground for setting the election aside. *DIT-MCO, Inc.,* 163 NLRB No. 147 (1967). Of course, at the time the Regional Director and Board ruled in the instant case, *Lobue* was valid

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[12]It should be noted that when the *Gorbea* case returned for the second time to the Court of Appeals for the First Circuit, that Court refused to enforce the order against the employer. 328 F. 2d 679 (1964). Similarly, the Court of Appeals for the Sixth Circuit refused to enforce the Board's position in the *Gilmore* case. See *NLRB v. Gilmore Industries, Inc.,* 341 F. 2d 240 (1965).

Board Law. K-Mart submits that the subsequent overruling of that case has no relevance here and should not work, *post facto,* to legitimatize acts which amounted to illegal inducements when they occurred. The Union quite obviously could not have relied on the Board's *subsequent* ruling.

More importantly, K-Mart urges that *DIT-MCO, Inc.,* which overturned *Lobue* as based on a faulty premise, is itself the product of unsound reasoning, and should not be followed by this Court.

In *DIT-MCO, Inc.,* the Board rationalized that where a waiver of initiation fee is conditioned on the outcome of an election no fee will be paid regardless of the result. If the Union wins there is, by postulate, no obligation, and if it loses, there is still no obligation because the Union is not the employees' representative. Therefore, said the Board, it is "illogical to characterize as improper inducement or coercion to vote 'Yes' a waiver of something that can be avoided simply by voting 'No'."

Boiled down, *DIT-MCO* reflects the Board's subjective opinion, unaided by any statistical or other supporting data, that a waiver of fees does not constitute an inducement to vote for the Union. Yet who is in a better position to know what ploys are effective in an election campaign, the Board or the Union? Unions are not eleemosynary institutions and would hardly engage in such waiver tactics unless they believed them to be a valuable organizational tool. If the Board is correct, and waivers are no inducement, Unions have foregone millions of dollars over the years to no good purpose.

Finally, the Board cases are legion that if an *employer* conditions any benefit (even a raise totalling less per year than the amount of initiation fee waived by the Union) on the outcome of an election, he is guilty of objectionable conduct. The Board here has taken another

step to insure that in the duel for employee's votes, the Union is armed with a machine gun, while the employer must counter with a pillow.

On all the facts and the law, taking together the certificate and letter in question, the Union made an outright offer of financial reward in the event of a victory, squarely within the prohibition of *Gruen Watch, Gorbea, Gilmore* and *Lobue, supra.* This Court should reject *DIT-MCO, Inc.,* find that the Union's action constituted improper election interference, and set aside the election on this ground as well.

6. The Union Circulated a Letter Containing False and Misleading Statements Concerning Payment of Union Dues Which, in and of Itself, Interfered With a Proper Election.

Approximately a week prior to the election the Union sent or distributed to K-Mart Commerce store employees a letter which falsely represented facts with regard to the payment of double union dues [Vol. III, G.C. Ex. 16, Objection No. 4].

Because of space requirements the facts and law concerning this objection will not be repeated here. The court is, however, respectfully referred to Vol. III, G.C. Ex. 32, pp. 11-14, for K-Mart's discussion of this objection in its Request for Review to the Board.

In summary, one cannot reconstruct the voyage of K-Mart's objections through the channels of administrative procedure below without being impressed by the undeniable fact that they were grossly mishandled by the Board at every turn. The initial error, committed by the Regional Director, was his failure to direct a hearing for the purpose of resolving the numerous conflicts in evidence uncovered by his investigation of these objections. This error, prejudicial enough standing alone, was compounded by the Board when,

almost incredibily, it concluded that K-Mart's charges, which cover a broad spectrum of alleged violations ranging from physical threats to deliberate misrepresentations, were insufficient to warrant setting aside the election even if they accurately described the Union's conduct.

While the Board has considerable discretion in these matters, it is proper to observe that with discretion goes responsibility. An integral part of that responsibility is to assure that parties raising substantial and material objections are accorded a fair hearing, and that such objections are not summarily discarded in language of the highest abstraction and generality. The Board has not properly performed its function. The election below was tainted by illegal Union conduct and subsequently whitewashed by the Board. As a result, the Union's certification cannot be allowed to stand.

V.
CONCLUSION.

For each and all of the above reasons, the Order which the Board seeks here to enforce is not supported by substantial evidence in the record and is contrary to all applicable case law. We most earnestly request that enforcement of the instant Order, accordingly, be denied.

Respectfully submitted,

CLARK, KLEIN, WINTER, PARSONS & PREWITT,
JOHN DONNELLY,
Attorneys for Petitioner, K-Mart, a Division of S. S. Kresge Co.

Of Counsel:
HILL, FARRER & BURRILL,
STANLEY E. TOBIN,

Certificate.

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

STANLEY E. TOBIN

APPENDIX A.

Dissent in Thriftown, Inc. (161 NLRB No. 42).

"In the case now before us, the operating agreement not only specifically states that 'nothing in this agreement shall in any way be construed to constitute a co-partnership or joint venture between the parties hereto'; it also specifically provides that Astra, without the participation of Thriftown, will hire, fire, and discipline its own employees, determine their wages, rates of pay, and other benefits, and establish its own deductions for taxes, social security, and related items. These provisions are clearly at odds with a contractual intent on the part of Thriftown and Astra to create a joint-employer relationship. Nor are there in this record other facts from which such an intent may reasonably be inferred. We look in vain in our colleagues' opinion for evidence that Thriftown has actually controlled Astra's labor policies. Our colleagues rely only upon (1) vague provisions in the license agreement requiring Astra to conform to Thriftown's 'methods, rules, business principles, practices, policies and regulations,' and (2) the power granted to Thriftown to cancel the agreement upon only 60 days' notice without cause and upon 15 days' notice for good cause. We believe, however, that this evidence is insufficient to support a legal conclusion that Astra and Thriftown are joint employers. The conformity requirements are quite clearly aimed at fostering the public appearance of a single integrated enterprise. They have nothing to do with

the employment relationship as such. Nor do we think it controlling on the issue before us that the operating agreement grants Thriftown the ultimate right to dissolve the licensor-licensee relationship entirely. To our knowledge this is the first time that such a factor has been considered to be evidence of a joint-employer relationship. In fact, in the recent Bab-Rand Company case, one of the reasons upon which the Board relied in refusing to find a joint-employer relationship was that the lease agreement gave the licensor the right to terminate the lease within 24 hours if the licensee became involved in a labor difficulty that might lead to picketing of the store. We note, parenthetically, that the operating agreement also grants Astra the 'ultimate right' to terminate the lease agreement. Would the majority conclude from this that Astra is an employer of Thriftown's employees?

"The majority attempts to buttress its joint-employer finding by generalized references to Thriftown's 'extensive powers to control the operations of Astra', 'its retention of overall managerial control', and 'the extent to which it has retained the right to establish the manner and method of work performance.' We do not agree that the record in this case supports such broad conclusionary assertions. However, even if it did, these considerations appear to us to provide only a further indication of the parties' concern with creating the public impression of a unified enterprise. They are not enough to show that the parties *have established in*

fact a joint-employer relationship with respect to the licensee's employees. Substantially the same factors were present in S.A.G.E., Inc. of Houston. Although finding in that case that the licensor and licensee had created the impression of a single integrated enterprise, the Board nevertheless declined to find that the licensor and licensee were joint employers, and this because neither the license provisions nor the actual practice of the parties revealed that the licensor had the power to exercise, or actually did exercise, control over the labor policies of the licensee. We believe the same conclusion is compelled in this case for the same reason.

"The majority states that it does 'not intimate by (its) holding that licensor-licensee arrangements in a discount department store necessarily create a joint-employer relationship.' Yet the majority reverses the Regional Director's conclusion that Thriftown and Astra are not joint employers for the declared reason that the Regional Director 'failed to take into consideration the special nature of the relationship which exists between the parties in a discount department store.' From our reading of the majority opinion we take it that *our colleagues consider the creation of the outward appearance of a unified enterprise to be the mark of the 'special nature of the relationship' to which they allude. If that is so, we find it difficult to conceive of a situation where the majority would not almost as a matter of course find a joint-employer relationship present in any discount store operation involving a licensor-licensee arrangement.* In that respect we

think our colleagues go too far. We still believe in accordance with past precedent that there must be some legal foundation for a holding of a joint-employer relationship, supported either by language in the license agreement establishing that the licensor is empowered to influence the licensees' labor policy, or by a showing that the licensor has actually done so, from which the power to do so may be inferred. As there is no support for such a holding in this case, we dissent." (Emphasis supplied).

APPENDIX B.

COMPARATIVE CHART OF RETAIL JOINT-EMPLOYER CASES (1961-1967)

T CRITERA EMPHASIZED BY NLRB[1]	"CONTROL" STANDARD K-Mart License Agreement drafted ↓ at this time.											"APPEARANCE STANDARD		
	Bargain City USA, Inc., 131 NLRB 803 (1961)	Frostco Super Save Stores Inc., 138 NLRB 125 (1962)	United Stores of America, 138 NLRB 383 (1962)	Spartan Dept. Stores, 140 NLRB 608 (1963)	S.A.G.E. Inc. of Houston, 146 NLRB 325 (1964)	Bab-Rand Co., 147 NLRB 247 (1964) [White Front Stores, Inc.]	Esgro Anaheim, Inc., 150 NLRB 401 (1964) [White Front Stores, Inc.]	New Fashion Cleaners, Inc., 152 NLRB 284 (1965) [White Front Stores, Inc.]	Triumph Sales, Inc., 154 NLRB No. 71 (1965) [White Front Stores, Inc.]	Grand Central Liquors, 155 NLRB No. 33 (1965)	Jewel Tea Co., 162 NLRB No. 44 (1967)	K-Mart (Commerce),[5] 21-RC-9309, et al. (1965)	K-Mart (San Fernando), 159 NLRB No. 28 (1966),	Thriftown, Inc., 161
); licensor control ing policies of censees?	yes	no	some	no	no	no	no	no	no	no	yes	no	no	n
licensor discharge lic- ees' employees?	yes	yes	yes	yes	no	no	no	yes	no	yes	yes	no	no	n
); licensor control hours mployment for licen- ;' employees (other h opening and closing rs for store)?	yes	no	no	yes	no	no	no	no	no	no	no	no	no	n
); licensor determine es of licensees' oyees?	yes	no	no	yes	no	no	no	no	no	no	no	no[6]	no[6]	n
payroll for all oyees?	yes	no	no	no	no	no	no	no	no	no	no	no	no	n
licensor control ber of licensees' em- yees (other than fficient number")?	yes	yes	no	?	no	no	no	no	no	no	no	no	no	n
form fringe benefits?	yes	no	no	yes	no	no	no	yes	no	no	yes	no	no	n
s licensor set labor ations policies for ensees?	yes	yes	yes	yes	no	some[3]	some[3]	some[3]	no	yes	?	no	no	n
ISION) JOINT EMPLOYER?	yes	yes	yes[2]	yes	no	no	no	no	no	yes[4]	yes	yes	yes	yc

f these cases involve retail employers relationship is fixed by contract. er the relationship is licensor-licensee ssor-lessee, the criteria generally sized by the NLRB is the same. Not all ria are emphasized in all cases. In cases certain criteria are not dis- d but the facts appearing in those ions supply the basis for answering criteria questions on this chart. In cases the answer is not supplied even e given facts and, where so appropriate, stion mark is used.. In all these cases, oard found the employees shared the same ities, that the licensor promulgated m rules and regulations, that the lic- had customer-oriented supervisory con- over the operations of the store and the licensor and licensees held themselves o the public as a single store.

3
Licensees agreed to be bound by any collc bargaining agreement negotiated by licens

4
The Board discussed and properly distingu the Esgro line of cases.

5
The Regional Director's Decision in the representation case on the joint employer question appears at Vol. III, G.C. Ex. 5

6
The NLRB erroneously concluded that K-Mar controlled wage rates for its licensees' employees.

APPENDIX C.

Statutes and Code Sections.

Sec. 8(a): It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: *Provided,* That nothing in this Act, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in section 8(a) of this Act as an unfair labor practice) to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later, (i) if such labor organization is the representative of the employees as provided in section 9(a), in the appropriate collective-bargaining unit covered by such agreement when made, and (ii) unless following an election held as provided in section 9(e) within one year preceding the effective date of such agreement, the Board shall have certified that at least a majority of the employees eligible to vote in such election have voted to rescind the authority of such labor organization to make such an agreement: *Provided further,* That no employer shall justify any discrimination against an employee for nonmembership in a labor organization (A) if he has reasonable grounds

for believing that such membership was not available to the employee on the same terms and conditions generally applicable to other members, or (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a);

Sec. 8(b): It shall be an unfair labor practice for a labor organization or its agents—

(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 7: *Provided,* That this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein;

Sec. 9(c)(3): No election shall be directed in any bargaining unit or any subdivision within which, in the preceding twelve-month period, a valid election shall have been held. Employees engaged in an economic strike who are not entitled to reinstatement shall be eligible to vote under such regulations as the Board shall find are consistent with the purposes and provisions of this Act in any election conducted within twelve months after the commencement of the strike. In any election where none of the choices on the ballot receives a majority, a run-off shall be conducted, the ballot providing for a selection between the two choices receiving the largest and second largest number of valid votes cast in the election.

Sec. 9(e)(1) Upon the filing with the Board, by 30 per centum or more of the employees in a bargaining unit covered by an agreement between their employer and a labor organization made pursuant to section 8-(a)(3), of a petition alleging they desire that such authority be rescinded, the Board shall take a secret ballot of the employees in such unit and certify the results thereof to such labor organization and to the employer.

(2) No election shall be conducted pursuant to this subsection in any bargaining unit or any subdivision within which, in the preceding twelve-month period, a valid election shall have been held.

Sec. 10(f) Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any United States court of appeals in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the United States Court of Appeals for the District of Columbia, by filing in such court a written petition praying that the order of the Board be modified or set aside. A copy of such petition shall be forthwith transmitted by the clerk of the court to the Board, and thereupon the aggrieved party shall file in the court the record in the proceeding, certified by the Board, as provided in section 2112 of title 28, United States Code. Upon the filing of such petition, the court shall proceed in the same manner as in the case of an application by the Board under subsection (e), and shall have the same jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper, and in like manner

to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board; the findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall in like manner be conclusive.

Board Regulations, Section 102.69:

(c) If objections are filed to the conduct of the election or conduct affecting the result of the election, or if the challenged ballots are sufficient in number to affect the result of the election, the regional director shall investigate such objections or challenges, or both. If a consent election has been held pursuant to section 102.62(b), the regional director shall prepare and cause to be served on the parties a report on challenged ballots or objections, or both, including his recommendations, which report, together with the tally of ballots, he shall forward to the Board in Washington, D.C. Within 10 days from the date of issuance of the report on challenged ballots or objections, or both, or within such further period as the Board may allow upon written request to the Board for an extension received not later than 3 days before such exceptions are due in Washington, D.C. with copies of such request served on the other parties, any party may file with the Board in Washington, D.C., eight copies of exceptions to such report, which shall be printed or otherwise legibly duplicated, except that carbon copies of typewritten matter shall not be filed and if submitted will not be accepted. Immediately upon the filing of such exceptions, the party filing the same shall serve

a copy thereof on the other parties and shall file a copy with the regional director. A statement of service shall be made to the Board simultaneously with the filing of exceptions. If no exceptions are filed to such report, the Board, upon the expiration of the period for filing such exceptions, may decide the matter forthwith upon the record or may make other disposition of the case. The report on challenged ballots may be consolidated with the report on objections in appropriate cases. If the election has been conducted pursuant to a direction of election issued following any proceeding under section 102.67, the regional director may (1) issue a report on objections or challenged ballots, or both, as in the case of a consent election pursuant to section 102.62 (b), or (2) exercise his authority to decide the case and issue a decision disposing of the issues and directing appropriate action or certifying the results of the election. In either instance, such action by the regional director may be on the basis of an administrative investigation, or, if it appears to the regional director that substantial and material factual issues exist which can be resolved only after a hearing, on the basis of a hearing before a hearing officer, designated by the regional director. If the regional director issues a report on objections and challenged, the parties shall have the rights set forth in subsections (c) and (e) of this section; if the regional director issues a decison, the parties shall have the rights set forth in section 102.67 to the extent consistent herewith.

(d) Any hearing pursuant to this section shall be conducted in accordance with the provisions of sections 102.64, 102.65, and 102.66, insofar as applicable, ex-

cept that upon the close of such hearing, the hearing officer shall, if directed by the regional director, prepare and cause to be served on the parties a report resolving questions of credibility and containing findings of fact and recommendations as to the disposition of the issues. In any case in which the regional director has directed that a report be prepared and served, any party may, within 10 days from the date of issuance of such report, file with the regional director the original and one copy, which may be a carbon copy, of exceptions to such report. A copy of such exceptions shall immediately be served on the other parties and a statement of service filed with the regional director. If no exceptions are filed to such report, the regional director, upon the expiration of the period for filing such exceptions, may decide the matter forthwith upon the record or may make other disposition of the case.

Calif. Unemp. Ins. Code Sec. 1262; Strike; ineligibility. An individual is not eligible for unemployment compensation benefits, and no such benefits shall be payable to him, if he left his work because of a trade dispute. Such individual shall remain ineligible for the period during which he continues out of work by reason of the fact that the trade dispute is still in active progress in the establishment in which he was employed.

APPENDIX D.

(Pursuant to Rule 18(f) of the Rules of Court).

1. Representation Case Exhibits (21-RC-9128, et al.)

GENERAL COUNSEL'S EXHIBITS*

No.	Identified	Offered	Received	Rejected
1(a) - 1(j)	6	7	7	
Employer's (K-Mart) Exhibits*				
1	70	70	71	
2	138	138	138 – 39	
3(a)	214	215	215	
3(b)	216	216	217	
3(c)	217	218	219	
3(d)	219	220	220	
3(e)	221	222	222	
3(f)	222	223	223	
3(g)	224			

*References are to the Reporter's stenographic transcript appearing at Transcript of Record, Volume II-A.

2. Unfair Labor Practice Case Exhibits (Case No. 21-CA-6937)

GENERAL COUNSEL'S EXHIBITS*

No.	Identified	Offered	Received	Rejected
1(a) - (j)	7	7	7	
2(a) - 49	18	18	19	
K-Mart Exhibits*				
1(a) - (d)	43 – 44	44	48	
1(e) - (d)	49	49	50	
2, 3	50 – 52	52		52
4	55	55	55	
5	56	56		57 – 58
Mercury Exhibits*				
1-4	61 – 62	62	63	

*References are to the Reporter's stenographic transcript appearing at Transcript of Record, Volume II.